Supreme Court, U.S.
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No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MADISON CABLEVISION, INC.,
Petitioner,

v.

THE CITY OF MORGANTON, NORTH CAROLINA;
MAYOR MEL COHEN, in his official capacity;
CITY MANAGER DOUGLAS O. BEAN, in his official capacity;
and COUNCIL MEMBERS ROBERT H. CHOATE,
MOLLIE M. DARWIN, ALFRED W. HAMER, JR., and
DANNY H. LINGERFELT, in their official capacities,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the First Amendment permit a city government to use its franchising authority to silence a private cable television operator and prohibit service by other private companies in order to establish a government monopoly over the medium of cable television?

2. In reviewing actions by a city government that abridge speech and restrict private media activities while granting the government the exclusive power to operate a particular medium of expression, are the federal courts required to make an independent review of the facts and circumstances purporting to justify the government restriction, or must the courts defer to the findings of the city council as a "legislative body"?

PARTIES TO THE PROCEEDING

Petitioner, the plaintiff in the district court and appellant in the court of appeals, is Madison Cablevision, Inc.* Respondents, defendants in the district court and appellees in the court of appeals, are The City of Morganton, North Carolina; Mayor Mel Cohen, in his official capacity; City Manager Douglas O. Bean, in his official capacity; and Council Members Robert H. Choate, Mollie M. Darwin, Alfred W. Hamer, Jr., and Danny H. Lingerfelt, in their official capacities.

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* Madison Cablevision, Inc.'s stock was acquired in 1980 by Madison Communications, Inc., a Delaware corporation, which was an indirect wholly-owned subsidiary of Tele-Communications, Inc. ("TCI"). The intermediate subsidiary corporations were Cable Investments, Inc. and TCI Growth, Inc. Since that time, a corporate restructuring has transferred Madison's operations, with the consent and approval of the City of Morganton, to TCI Cablevision of North Carolina, Inc., a corporation which is likewise an indirect wholly-owned subsidiary of TCI.

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PETITION FOR WRIT OF CERTIORARI

Madison Cablevision, Inc., ("Madison") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is unreported. The opinion of the district court in this case (Pet. App. C) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 22, 1991. (Pet. App. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT

This case arises from the unprecedented action of a city government ordering a private cable television company out of business, rejecting service proposals by two other private companies and establishing a government monopoly over cable television—a medium of expression protected by the First Amendment. When asked to review the serious constitutional issues raised by the city's actions, the district court dismissed the case, without making an independent evaluation of the city's purported justification for its restrictions on speech, finding as a matter of law that the court was precluded from making a judicial determination of the disputed facts, but was instead obligated to defer to the findings of the city council as a "legislative body." The court of appeals affirmed in a *per curiam* opinion on the basis of the district court decision. Petitioner seeks review by this Court of the city's appropriation for itself of an arm of the modern press and of the lower courts' wholly deferential response to that extraordinary assertion of government power.

Madison Cablevision, Inc. ("Madison") and its predecessor, another private company, have provided cable

television service in Morganton, North Carolina for more than twenty years. Some years prior to the impending expiration of Madison's nonexclusive franchise in 1986, the city began to explore the possibility of establishing a municipal cable television system to complement its municipal electric system and provide additional revenue for the city. The efforts of the private cable companies had long since been successful in convincing the citizens of the value of cable television, and the advent of satellite-delivered programming in the early 1980's, such as HBO and the Disney Channel, helped push subscribership on the cable system to more than 70% of the households in the community.[1] The city hired consultants and a Washington, D.C. law firm to assist it and commissioned a feasibility study to see whether a municipal cable system would be profitable under such conditions. Not surprisingly, the consultants concluded that a municipal system could be profitable if it achieved the same 70% subscriber level that Madison enjoyed.

The consultants' feasibility study did not explain what would happen to Madison or its system, and the study offered no explanation for the consultants' assumption that all the customers of Madison's cable system would become customers of the city's proposed municipal cable system. The report does make clear, however, that the proposed municipal system could not reach its projected level of profitability without attracting all of Madison's existing subscribers.

Neither Madison nor the public were informed about the consultants' conclusions, but the city continued to refuse to negotiate a renewal of Madison's franchise. On September 24, 1984, the city announced that it was issuing a request for franchise proposals and that it would consider at the same time whether to construct a system

[1] Continued expansion of the cable system and its services have increased that percentage. Now more than 80% of the households in Morganton are subscribers to Madison's system.

to be owned and operated by city government. Madison was then notified that its request for renewal of the franchise would be considered at the same time.[2] Applicants were given 30 days to submit franchise proposals and to prepare the voluminous response called for in the city's request for proposals. A public hearing before the city council involving all interested parties had been scheduled as part of the initial announcement by the city and was held several weeks after submission of the proposals. Parties were instructed, without explanation or additional guidance, to submit any additional information within 30 days of the hearing. Following this abbreviated and accelerated period for submission of proposals and public hearing, the city and its consultants and attorneys spent almost a full year drafting the city council opinion and related reports that constitute the "record" relied upon by the district court.

On September 9, 1985, the city council adopted the extraordinary ordinance that gave rise to this litigation. The city council decided (a) to establish a city owned and operated cable television system; (b) to deny Madison's request for renewal of its franchise; (c) to deny the franchise applications of the other two private companies; and (d) to prohibit (for a period of five years) the provision of cable television service in Morganton by anyone in competition with the city's cable television system.[3]

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[2] The September 24, 1984 notice was issued just prior to enactment of the Cable Communications Policy Act of 1984 (47 U.S.C. § 521 *et seq.*) (the "Cable Act") and enabled the city to argue that Madison was not entitled to the renewal protections of the Cable Act. The district court concluded that Madison was not entitled to those protections since there were fewer than 30 months remaining on the term of the franchise on the effective date of the Cable Act. The court of appeals affirmed that determination without comment. Madison does not seek review of that decision.

[3] In its ordinance, the city council ordered Madison to submit a plan within 90 days for removal of its equipment and lines from the

Madison sought review in the district court of the city's actions. The city moved immediately for summary judgment based on the "record" of its franchising process. Madison opposed the motion with affidavits and sought discovery from the city on the contested issues of fact, including the capacity of the rights-of-way in Morganton to accommodate more than one cable system. The city's motion for a protective order was granted and Madison was barred from all discovery. Based solely on the materials and the lengthy city council opinion presented by the city, the trial court granted summary judgment for the city, finding that it was obligated to defer to the city council's legislative determination.[4] Indeed, the dis-

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city's poles and rights-of-way. When Madison failed to submit such a plan, the city council scheduled a meeting to take further action against Madison. At that point, Madison commenced the action that is the subject of this petition. At the suggestion of the city, and with the consent of Madison, the district court later entered an order preserving the *status quo* and allowing Madison to continue to provide cable service during the pendency of the litigation. (Pet. App. E). Madison continues to serve its subscribers in Morgtanon and the city has not yet notified Madison when it will be required to terminate its service. The city has not constructed its proposed municipal system and no alternative cable service is currently available. A local citizens' initiative and petition drive has forced the city to call an election, which is scheduled for March 10, 1992, on whether the city should proceed with its plans to establish a municipal monopoly or allow service by competing private cable companies, including Madison.

[4] Following submission of briefs and oral argument, the district court initially determined that certain of Madison's state claims raised "difficult and unsettled" issues of state law which should be resolved in state court. Madison was instructed to institute an action in state court and the federal proceeding was stayed. (Pet. App. D). The district court retained jurisdiction of the federal claims and certain pendent state claims, including a state free speech claim under Article I, Section 14 of the North Carolina Constitution, pending resolution of the specified issues in state court.

In accordance with the district court's abstention order, Madison filed an action for declaratory judgment in the Superior Court of Burke County on whether the city's plans violated the "public pur-

trict court refused even to consider the evidence offered by Madison to contradict the findings of the city council:

> Madison has submitted affidavits challenging the factual basis for the Council's decisions. It appears that it is contending that each factual finding made by the Council should be retried by a jury. However, the issue before the Court is not whether the Council made the right decision, but whether the evidence before the Council when it adopted the ordinance was adequate to support the decision. It must be remembered that the City Council of Morganton is a legislative body. (Pet. App. 13a).

The trial court concluded, on the basis of the city's record, that the decision to limit cable service to a single operator furthers the "substantial government interests" of preventing disruption of city streets and rights-of-way, conservation of space on city utility poles and ensuring that public rights-of-way are optimally used. Madison sought to offer evidence on these issues, particularly to prove that at least one cable line could be added on the existing utility poles or placed underground in the rights-of-way without undue disruption. The district court refused to consider this evidence, erroneously adopting the city's view that it could properly consider only the evidence previously considered by the city council:

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pose" provisions of the North Carolina constitution and on questions of state law on antitrust, monopoly and exclusive privileges issues. The Superior Court granted summary judgment on those claims for the city without opinion. On appeal, the North Carolina Supreme Court affirmed the decision of the Superior Court, but noted pointedly that it had not been asked to rule on whether the city's actions violated the free speech provision of the North Carolina Constitution. *Madison Cablevision, Inc. v. City of Morganton*, 325 N.C. 634, 386 S.E.2d 200 (1989).

Following the ruling by the North Carolina Supreme Court, the city renewed its motion for summary judgment in the federal district court. Madison restated its opposition to the motion, renewed its request for discovery and sought leave to amend the pleadings. The motion for leave to amend and the request for discovery were denied, and summary judgment was entered against Madison on all its claims for relief.

> Because the Court has determined that the case should be decided on the basis of the record before the Council, the affidavits [offered by Madison] are irrelevant. (Pet. App. 19a-20a).

As a result, the district court concluded that no further analysis was required to satisfy the First Amendment:

> The Council's decision not to franchise more than one cable operator clearly passes muster under *O'Brien* [*United States v. O'Brien*, 391 U.S. 367 (1968), which provides the applicable First Amendment standard] in light of the evidence before it [the city council] . . . (Pet. App. 18a).

On this basis, both the district court and the court of appeals sanctioned the city's decision to establish a government monopoly over cable television.

REASONS FOR GRANTING THE WRIT

This is not a case of mere limitation on freedom of speech and the press—this is a case of total usurpation by the government of the press role for itself. By using its franchising authority to shut down the existing private cable television system and by prohibiting service by other private companies, the city government has granted itself a monopoly over the medium of cable television in Morganton. Here, the government's duty to balance speech interests against "other societal interests," as contemplated by this Court's decision in *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986), has not resulted in an accommodation of private speech and public convenience, but in *no* private speech. Plenary review by this Court is essential to ensure that the uncertain boundaries of First Amendment protection for cable television are "shaped" rather than obliterated.

Cable television franchising is essentially a form of government licensing of speech and press. This Court has long recognized that the First Amendment limits gov-

ernment authority to condition the right to speak upon the grant of a government license. *See, e.g., Thornhill v. Alabama*, 310 U.S. 88 (1940); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988). As the Court has noted, attempts to license speech present troubling prospects of government favoritism and censorship. *See Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969). At the very least, the imposition of licensing requirements, and their use to deny opportunities for speech, require exacting judicial scrutiny.

The need for careful scrutiny is all the more compelling when a government decides to license only a single speaker, and then concludes that the government itself should be the recipient of the sole license. The courts below saw their role differently, however, choosing instead to defer entirely to the judgment made by the city on the basis of a "legislative record." This judicial approach is wrong on at least two counts: first, even if the "record" is taken at face value, it does not justify the extraordinary step of allowing the city to confer upon itself a monopoly over speech provided by means of cable television; and, second, it is quite wrong for a court deciding First Amendment issues to abdicate the responsibility of independent fact-finding in favor of reliance on a record developed by the government imposing the restriction on speech. *See Preferred*, 476 U.S. at 496. Both issues are important and warrant the attention of this Court.

I. NO GOVERNMENTAL INTEREST IDENTIFIED BY THE CITY IS SUFFICIENT TO JUSTIFY A GOVERNMENT MONOPOLY OF CABLE TELEVISION

Cable television is a medium of expression protected by the First Amendment from unwarranted government intrusion. *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986); *Leathers v. Medlock*, 111 S.Ct. 1438 (1991). In selecting the material to be of-

fered over a cable system, the operator serves as an editor or publisher, choosing from many alternative sources, the range of news, sports, weather, cultural, religious, political and other programming that will be offered.[5] Where this editorial responsibility is regulated by government, the government will inevitably be drawn into making and shaping political and religious choices—a role for which government is not only unsuited, but a role which the First Amendment seeks to reserve for private discretion free of government control. *See Quincy Cable TV, Inc. v. Federal Communications Commission*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied sub nom. National Association of Broadcasters v. Quincy Cable TV, Inc.*, 476 U.S. 1169 (1986). For that reason, government licensing schemes affecting speech are inherently suspect.

In the last few years there has been a significant increase in the number of government-owned cable television systems. During the same period, cable television has become an increasingly important source of news and information for the public. On the local level, more and more cable systems are originating their own programs, editorializing on local issues and providing a forum for citizens to express their views. In smaller communities like Morganton, not served by any local television service, the cable television system is the only potential source

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[5] Cable television was originally devised as a method for improving reception of over-the-air broadcast television and of extending television service to areas that could not be reached by traditional broadcast signals. In the mid-1970's, as a result of technological improvements made possible through orbiting communications satellites, a new and unique source for programming was created, resulting in the well-known services like HBO, CNN, C-SPAN, and ESPN. This dramatic change in the nature of the medium has greatly expanded the editorial role of the cable operator, making that function virtually indistinguishable from the role of the newspaper editor who selects syndicated columns, comics, opinion pieces, feature articles, wire service stories and other materials to be offered as a single package.

for such local expression of political views through television. By their nature, such views will sometimes be critical of local officials. As recent filings with this Court indicate, government competition with private media raises concerns about unfair competition that may lead to suppression of private speech. *See Warner Cable Communications, Inc. v. City of Niceville*, 911 F.2d 634 (11th Cir. 1990), *cert. denied*, 111 S.Ct. 2839 (1991); *Paragould Cablevision, Inc. v. City of Paragould & The Paragould Light And Water Commission, et al.*, 930 F.2d 1310 (8th Cir.), *cert. denied*, 112 S.Ct. 430 (1991). This case presents a far more extreme problem: an outright ban on private speech through cable television and a government monopoly of the medium. A government decision of that magnitude—that government *alone* will make the necessary editorial decisions on television service for the community—obviously warrants especially exacting scrutiny by reviewing courts.

A respected commentator has stated flatly that "one of the necessary conditions for freedom of the press is the absence of government attempts to replace the private sector press with a government press." John E. Nowak, "Using the Press Clause to Limit Government Speech," 30 Ariz. L. Rev. 1 (1988). Government is not, and should not be, responsible for deciding what articles its citizens read or what programs they view. *See also Legi-Tech v. Keiper*, 766 F.2d 728, 733 (2d Cir. 1985) ("[t]he evils inherent in allowing government to create a monopoly over dissemination of public information in any form seem too obvious to require extended discussion"). Yet the very purpose of establishing and operating an arm of the press as a government entity is to take on this function—to establish the government in an editorial role —and to make what was formerly a private decision into a governmental one. The inescapable result is to redefine the opportunities for speech, increasing government control at the expense of private control.

Where the government imposes a monopoly for itself on speech through a particular medium, the First Amendment would be meaningless unless the courts require genuine proof of the necessity of such a ban. The city council's curtailment of Madison's right to continue to provide cable service and its ban on service by other private operators can be permitted only if the city can prove convincingly each of the elements required under the analysis of *United States v. O'Brien*, 391 U.S. 367 (1968), i.e., that (1) the government regulation is within the constitutional power of government; (2) it furthers an important or substantial governmental interest; (3) the governmental interest is unrelated to the suppression of free expression; and (4) the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of that interest. *O'Brien*, 391 U.S. at 377.[6]

Overlooking for the moment the serious factual disputes in this case, it is readily apparent that the district court gave only the most cursory attention to the interests advanced to justify a city-controlled monopoly on the medium of cable television. Not only did the district court fail to give proper regard to the speech interests at stake, it largely accepted at face value the assertion that the city's action was essential to achieve its goals and not unduly restrictive of First Amendment rights.[7]

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[6] Sometimes referred to as the "incidental burdens" test, the *O'Brien* rationale has traditionally been used to judge government actions that limit speech only "incidentally" in the course of regulating some conduct or other non-speech activity that is otherwise subject to regulation. In other words, the *O'Brien* test is most appropriately used where the regulatory focus is not on speech at all, but on other, non-speech activity. Here, by contrast, the courts are called upon to measure the propriety of direct government control of First Amendment activity, and the test suggested by *O'Brien* should be applied with great sensitivity to protect speech interests from unnecessary government intrusion.

[7] The district court's failure to apply the constitutionally required test properly is hardly subject to debate since the district court

But the interests advanced by the city—ranging from claims that its monopoly of cable television was necessary to prevent the dangers flowing from an "unregulated monopoly" to claims that it would prevent disruption of city streets—carry no such weight. In fact, none is important enough to justify curtailment of constitutional rights, and all can be served through less drastic, and more effective measures.

A few examples will suffice. In deciding that the city could properly "prevent the dangers flowing from unregulated monopoly control over scarce resources," the district court never gives any indication that the "regulation" to be permitted is over a medium of speech. Even assuming that two or more competing cable systems could not survive financially in Morganton, (but see pages 15-19 *infra*), it hardly follows that this sort of market limitation opens up an increased role for government in the regulation of speech. Indeed, this Court has firmly rejected the idea that economic scarcity justifies greater government control over the media. In *Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241 (1974), the Court invalidated a Florida statute requiring newspapers to provide free space to reply to published attacks on a political candidate's personal character, even though it recognized that "one-newspaper towns" were the norm. If the "natural monopoly" held by a single newspaper could not justify the limited intrusion on the media's discretion represented by the Florida law, it certainly would not justify the city's actions in this case.

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expressly declared that it was *not* obligated to review the city council's decision *de novo*, but was instead required to accord maximum deference to the city council as a legislative body. (Pet. App. 13a). This erroneous view led the district court to make serious evidentiary and procedural errors that would justify reversal independently. More importantly, however, it underscores that the district court weighed the interests at stake using a presumption that is exactly the opposite of the one required by the First Amendment.

See Quincy Cable TV, Inc. v. Federal Communications Commission, supra.

If the "unregulated monopoly" argument is a veiled suggestion that the city's cable service might be cheaper for subscribers—a fact that is in genuine dispute even in the record before the city council—the obvious remedy would be to allow the city system to compete with the private system and let the subscribers choose the service they think represents the better value. That is certainly a less restrictive alternative more in keeping with both the First Amendment and free enterprise. Moreover, this Court has not permitted economic or financial considerations of that sort to justify infringement of First Amendment rights. *See Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987). The idea of replacing the private media, or even restricting their activities through government control, in order to make speech less expensive is completely inconsistent with First Amendment principles. Any legitimate concerns the city might have about the effects of allowing Madison to continue in business with only limited direct competition can be adequately met by the imposition of reasonable minimum service requirements for all cable service providers, including Madison, or by allowing additional competition from other private companies. But the courts below simply ignored these obvious alternatives.

The courts below also relied on the asserted interest in preventing disruption of city streets. But, whatever legitimacy that interest may have in other contexts, it hardly carries force when the city advances it in support of a plan to tear out an existing system and replace it with a new one. It is readily apparent, in fact, that allowing Madison to continue, or expand, its existing system would entail the least disruption; allowing it to expand at the same time that the necessary pole modifi-

cations and other changes are made for a second system involves only slightly more disruption, if any. Furthermore, disruption could be minimized through scheduling, sharing of facilities and other far less drastic measures than municipal monopoly of cable television. Yet the courts below made no effort whatever to determine whether the ordinance adopted by the city was necessary to advance this supposed interest or not.[8]

The deferential attitude adopted by the courts below in this case is in marked contrast to the decisions of other lower courts in their continuing efforts to shape the contours of First Amendment protections for cable television in accordance with this Court's decision in *Preferred*. *See Century Federal, Inc. v. City of Palo Alto*, 648 F. Supp. 1465 (N.D.Cal. 1986); *Group W Cable, Inc. v. City of Santa Cruz*, 669 F.Supp. 954 (N.D.Cal. 1987); *Pacific West Cable Co. v. City of Sacramento, Cal.*, 672 F.Supp. 1322 (E.D.Cal. 1987); *Preferred Communications, Inc. v. City of Los Angeles*, No. CV 83-5846 (CBM) (C.D.Cal. January 5, 1990) (on remand). If the view espoused by the lower courts in this case becomes predominant, *Preferred* and similar cases will be drained of all vitality and the important First Amendment responsibility to guard against excessive government control will be shifted from the courts to the government regulators themselves.

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[8] The district court avoided any consideration of less restrictive alternatives by holding, as a matter of law, that the city had no legal obligation to allow *any* modification of the city's utility poles to accommodate two cable systems. (Pet. App. 20a). It offered no citation of authority for this remarkable conclusion, which is markedly at odds with the Court's mandate in *Preferred* to "balance" the competing interests, including the impact on public facilities and rights-of-way.

II. THE COURTS BELOW WERE REQUIRED TO CONSIDER MADISON'S EVIDENCE IN DETERMINING THE LAWFULNESS OF THE CITY'S ACTIONS AND THE EXISTENCE OF DISPUTED ISSUES OF FACT

Although we believe that the decision below is wrong even if it were proper to decide the case on the basis of the "record" compiled by the city council itself, we believe that the courts were also mistaken in limiting their attention to that "record." The lower courts refused to consider the evidence offered by Madison that the rights-of-way in Morganton could accommodate more than one cable system, that competition in cable television is economically feasible in Morganton, that Madison's proposal was adequate to meet the needs and interests of the community, or that any of the other facts were different from those determined by the city. Madison sought to prove that at least one cable line could be added on the existing utility poles or placed underground in the rights-of-way. This self-evident fact is not subject to genuine dispute and has been admitted without challenge in cable television litigation in numerous cities where the rights-of-way are identical in physical capacity to those in Morganton. Nevertheless, Madison offered affidavits and sought discovery, which the district court summarily denied, to establish this critical fact. The district court stated:

> Because this Court has determined that the case should be decided on the basis of the record before the Council, the affidavits [offered by Madison] are irrelevant. (Pet. App. 19a-20a).

Such an exclusion of evidence is indefensible. As this Court's discussion in *Preferred* makes clear, courts may not simply assume that a law furthers the interests asserted by the government. *Preferred*, 476 U.S. at 496. In First Amendment jurisprudence, where the necessary facts are not obvious, and the plaintiff proffers relevant

evidence, the court has an obligation to adjudicate the resulting factual issues. This obligation is not eliminated merely because the legislature purports to make a factual finding based on a legislative record. *Landmark Communications, Inc. v. Commonwealth of Virginia*, 435 U.S. 829, 843 (1978) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake."); *id.* at 844 ("Were it otherwise, the scope of freedom of speech and of the press would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified.")[9]

As this Court's decision in *Landmark* observes, one of the reasons for adoption of the First Amendment was as a check on excessive government power—indeed, freedom of the press was seen as the most important check on government power. *See* Frederick Schauer, "Free Speech and Its Philosophical Roots," in *The First Amendment—The Legacy of George Mason* 132, 135 (T. Daniel Shumate ed., 1987); V. Blasi, "The Checking Value In First Amendment Theory," 1977 Am. B. Found. Res. J. 521,

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[9] Even in cases where government action is not subject to the heightened scrutiny required by the First Amendment, an aggrieved party is permitted to present evidence challenging the government action. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981) ("parties challenging legislation . . . may introduce evidence supporting their claim that it is irrational . . .") (citing *United States v. Carolene Products Co.*, 304 U.S. 144, 153-54 (1938)). *See also Chastleton v. Sinclair*, 264 U.S. 543 (1924); *Weaver v. Palmer Bros. Co.*, 270 U.S. 402 (1926); *Kress, Dunlap & Lane, Ltd. v. Downing*, 286 F.2d 212, 215 (3d Cir. 1960); *Milnot Company v. Richardson*, 350 F. Supp. 221, 224 (S.D. Ill. 1972) ("While this court most certainly does not sit as a 'super legislature,' weighing the wisdom, need, or general appropriateness of legislative policy, it must consider the possible violation of due process of law in existing declared policy."); *City of Charlotte v. McNeely*, 281 N.C. 684, 690, 190 S.E.2d 179 (1972) ("Upon specific allegations tending to show bad faith, malice, wantonness, or oppressive and manifest abuse of discretion . . . the issue raised becomes the subject of judicial inquiry as a question of fact.")

529-44 (1977). That critical function would be lost if the government retained the power to decide what could be published based on its determination of what is "fair" or "best." In this case it would be particularly egregious, since the decision-making body, a city council anxious for the additional revenue and control that would come from operating its own cable system, was not a disinterested, impartial tribunal, but was a self-interested participant.

The trial court was simply mistaken in its belief that it had to defer to the city council and could not properly consider Madison's evidence. The district court misconstrued decisions regarding the proper limits of judicial power in reviewing the actions of the executive and legislative branches of government. Confusing the admonition that the courts may not "second-guess" the judgment of the co-equal branches of government in the lawful exercise of their power with a rule of evidence and procedure, the district court created a rule that would bar evidence offered to prove that the other branch of government had exceeded its lawful power by violating the Constitution. As this Court concluded in *Landmark*, whatever harmful effects flow from allowing full judicial scrutiny of legislation affecting First Amendment rights are precisely the sort of dangers "envisioned by the Founders in presenting the First Amendment for ratification." *Landmark*, 435 U.S. at 845.

The district court's decision granting summary judgment for the city recites a large number of critical facts as reasons for the decision. Those findings were directly contradicted by the evidence offered by Madison. The district court resolved this conflict in the evidence by declaring Madison's evidence "irrelevant," "conclusory" or "improper" and adopting without further consideration the "findings" of the city council as its own. The district court overlooked the evidence favoring Madison that was in the "record" before the city council. Madi-

son's franchise proposal, its explanations, its customer surveys and opposing arguments were ignored in deference to the city council's contrary "findings." Madison's affidavits, and Madison's evidence contained in the city's "record," created a genuine dispute of fact on each of these topics.

"[O]n summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (citing *United States v. Diebold, Inc.*, 369 U.S. 654 (1962)). The district court examined the materials submitted by the city only to see "whether the evidence before the Council when it adopted the ordinance was adequate to support the decision." (Pet. App. 13a). Because the district court was operating with a fundamental misconception about the substantive legal standard to be used in scrutinizing the city's actions, it utterly failed in its responsibility to ascertain whether there were genuine issues of fact. The district court reasoned that there were no genuine issues because the evidence offered by Madison that was contrary to the city's findings was not "material." The court deemed Madison's evidence to be immaterial because it felt the court was duty-bound to accept the findings of the city council as a legislative body. This presumption in favor of the moving party is exactly the opposite of the one that should have been applied and warrants reversal of the decision.[10] The error here is of constitutional dimen-

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[10] Additionally, the *O'Brien* standard under the First Amendment places the burden of proof on the city, not on Madison, with respect to the justification for the city's action. Using that standard, the quantum of proof required to sustain the city's burden as the moving party is higher and would not be satisfied by the conflicting evidence in the city's record. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Madison's other evidence directly controverting the city's claims eliminates all doubt that summary judgment was improper in this case.

sion because it resulted in sanctioning the destruction of a private media outlet and its replacement with a government surrogate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 20, 1992

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-1500

MADISON CABLEVISION, INCORPORATED,
a Delaware Corporation,
Plaintiff-Appellant,

v.

THE CITY OF MORGANTON, NORTH CAROLINA; MAYOR MEL COHEN, in his official capacity; CITY MANAGER DOUGLAS O. BEAN, in his official capacity; COUNCIL MEMBERS ROBERT H. CHOATE; MOLLIE M. DARWIN; ALFRED W. HAMER, JR.; and DANNY H. LINGERFELT, in their official capacities,
Defendants-Appellees,

and

TELE-COMMUNICATIONS, INCORPORATED,
Defendant.

Appeal from the United States District Court
for the Western District of North Carolina, at Shelby
Woodrow Wilson Jones, Senior District Judge

(CA-86-5-SH-C)

Argued: March 8, 1991

Decided: November 22, 1991

Before WIDENER and SPROUSE, Circuit Judges, and WARD, Senior United States District Judge for the Middle District of North Carolina, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Randall Maitland Roden, THARRINGTON, SMITH & HARGROVE, Raleigh, North Carolina, for Appellant. Joseph Leonard Van Eaton, SPIEGEL & MCDIARMID, Washington, D.C.; Thomas G. Smith, CREWS & HANCOCK, Fairfax, Virginia, for Appellees. ON BRIEF: Wade H. Hargrove, THARRINGTON, SMITH & HARGROVE, Raleigh, North Carolina, for Appellant. James N. Horwood, Donald Weightman, Lisa Gelb, SPIEGEL & MCDIARMID, Washington, D.C.; Steve B. Settlemyer, Morganton, North Carolina; W. Harold Mitchell, MITCHELL, BLACKWELL & MITCHELL, P.A., Valdese, North Carolina, for Appellees.

OPINION

PER CURIAM:

Madison Cablevision Inc. (Madison Cable) appeals from the district court's grant of summary judgment for defendants City of Morganton, and its mayor and city council and city manager, in this action. We refer to the defendants as the City. Madison Cable brought suit when its cable franchise expired and was not renewed by the City. It sought injunctive, declaratory, and monetary relief. The district court granted the City partial summary judgment, stayed further proceedings, and directed Madison Cable to institute a state court action with regard to certain state statutory and constitutional issues raised in Madison Cable's complaint. The North Carolina Supreme Court resolved the state law issues in favor of the City and that decision is reported as *Madison Cablevision v. City of Morganton*, 325 N.C. 634, 386 S.E.2d 200 (1989).

Thereafter, the City moved for reconsideration of the district court's partial summary judgment order. On reconsideration, the district court granted the City summary judgment as to Madison Cable's remaining claims, and entered judgment dismissing the suit with prejudice. Madison Cable appeals.

We have considered the record and the briefs of the parties and have heard oral argument in this case. We are of opinion that Madison Cable's suit was properly dismissed and affirm the judgment of the district court for the reasons stated by the district court in its careful and thoughtful opinions and orders.

AFFIRMED

APPENDIX B

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE
WESTERN DISTRICT OF NORTH CAROLINA

SHELBY DIVISION

SH-C-86-5

MADISON CABLEVISION, INC., a Delaware Corporation,
Plaintiff,

v.

THE CITY OF MORGANTON, NORTH CAROLINA; MAYOR MEL COHEN, in his official capacity; CITY MANAGER DOUGLAS O. BEAN, in his official capacity; and COUNCIL MEMBERS ROBERT H. CHOATE, MOLLIE M. DARWIN, ALFRED W. HAMER, JR., and DANNY H. LINGERFELT, in their official capacities,
Defendants.

JUDGMENT

[Filed May 14, 1990]

The issues arising in this cause have been determined by the Court as will appear in a Memorandum of Decision filed simultaneously herewith.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Defendants' motion for summary judgment be and the same is hereby allowed and the complaint is hereby dismissed with prejudice. The Plaintiff shall have and recover nothing of the Defendants and the Defendants shall recover their costs of the Plaintiff.

This the 11th day of May, 1990.

/s/ Woodrow W. Jones
United States District Judge

APPENDIX C

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE
WESTERN DISTRICT OF NORTH CAROLINA

SHELBY DIVISION

SH-C-86-5

MADISON CABLEVISION, INC.,
a Delaware Corporation,

Plaintiff,

v.

THE CITY OF MORGANTON, NORTH CAROLINA; MAYOR MEL COHEN, in his official capacity; CITY MANAGER DOUGLAS O. BEAN, in his official capacity; and COUNCIL MEMBERS ROBERT H. CHOATE, MOLLIE M. DARWIN, ALFRED W. HAMER, JR., and DANNY H. LINGERFELT, in their official capacities,

Defendants.

MEMORANDUM OF DECISION

[Filed May 14, 1990]

The Plaintiff, Madison Cablevision, Inc., a Delaware corporation, filed this action on January 6, 1986 seeking declaratory, injunctive and monetary relief against the Defendants, the City of Morganton, North Carolina, its Mayor and members of the City Council for alleged violation of its rights under various federal and state laws. The Defendants answered denying any violations of the Plaintiffs' rights under either federal or state laws and counterclaimed for damages for breach of contract, trespass and violations of state and federal antitrust laws.

The Defendants moved to dismiss the complaint under Rule 12(b)(1) and (6), Federal Rules of Civil Procedure and on April 4, 1986 moved for summary judgment under Rule 56, Federal Rules of Civil Procedure on the grounds that no genuine issue of material fact existed and they were entitled to a judgment of dismissal as a matter of law. In support of these motions the Defendants filed with the Court certain affidavits and copies of the proceedings had before the City Council relative to a franchise for a cable television system in the City of Morganton. The Plaintiff attached to its complaint a copy of the franchise agreement between the City and the Plaintiff and also filed some affidavits before the hearing. The Court heard arguments of counsel on the motions on May 16, 1986 and on July 9, 1986 entered its memorandum and order dismissing claims one and two set forth in the complaint. The Court declined to dismiss the other claims but abstained as to claim seven, which involved an allegation of violation of state monopoly and antitrust laws as set forth in North Carolina Constitution Art. 1, Sections 32 and 34 and North Carolina General Statutes Chap. 75, and claim eleven which involved an alleged violation of the public purpose requirement of the North Carolina Constitution pertaining to the validity of General Statutes 160A-311 and 312. The parties were directed to institute a state court action to obtain a decision on the validity of the state statutes and the constitutional provision. The state court action has been completed and the North Carolina Supreme Court has ruled in favor of the Defendants on these state issues. *Madison Cablevision, Inc. v. City of Morganton*, 325 N.C. 634, 386 S.E.2d 200 (1989).

The Defendants have now moved for a reconsideration of the Court's order denying summary judgment on claims three through twelve. The Court heard arguments of counsel on the motion on April 9, 1990 and now enters its findings and conclusions.

In October 1966, the City of Morganton, through its City Council, adopted an ordinance granting Morganton TV Cable, Inc., a non-exclusive franchise to construct and operate a cable television system in the City for a period of twenty (20) years, the maximum period authorized by state law. Morganton TV, Inc. transferred its interest in the franchise to Suburban Cablevision, Inc., which thereafter transferred the interest to the Plaintiff, Madison Cablevision, Inc. Madison and its predecessors in interest have operated a cable television service in the City of Morganton continuously since October 1966 even though the franchise expired on October 25, 1986. The City owns the power poles to which the cables are attached and the rights of way on which the poles are erected.

The franchise provides no right of renewal and contains no provisions regarding procedures for any renewal. It does grant to the City an option to purchase the property of the franchisee at the expiration of the franchise or any renewal thereof. It further provides that upon termination of the franchise the franchisee shall remove its posts, poles and television transmission and distribution system from city property and rights of way.

In December 1983 Madison submitted a proposal to the City that certain improvements in its service would be made if the franchise was extended for five (5) years beyond the twenty (20) year term. That proposal was denied by the City. At about that time the City began to gather information concerning the future of cable television in Morganton. Rice Associates, an independent consulting firm from Washington, D. C. was hired by the City to assist in its study of cable television and its future for Morganton. Rice Associates made three studies and concluded that the system then existing in the City was inadequate; that the City needed a modern cable communications system, and that a city-owned and operated cable system was feasible.

On September 24, 1984, after viewing the Rice studies, the City issued a Request for Information (RFI) to the general public. Copies of the RFI were provided to Madison, Burke County Cable Co., Ltd. and Catawba Valley Communications, Inc. These were the only private cable television companies to have expressed any interest in providing cable television service for Morganton at that time. The RFI stated that a public hearing would be held on November 14, 1984 for the purposes of:

> (a) determining whether the franchise then held by Madison should be renewed;
>
> (b) determining whether other private cable companies were interested and capable of providing cable service in Morganton;
>
> (c) determining whether Morganton should establish a municipal cable system;
>
> (d) determining whether there was any interest in an overbuild of the cable system then existing in the City; and
>
> (e) determining whether more than one cable system in the City was practical.

Madison, Burke Cable Co., Ltd. and Catawba Valley Communications, Inc. all responded to the RFI on October 26, 1984 and the public hearing was held on November 14, 1984 as planned. Representatives of each of the three cable television companies attended and participated in the council meeting. Madison's representative testified before the Council that the market in Morganton would support only one cable system. In addition to the representatives of the cable television companies, members of the general public, City employees, the President of Rice Associates and the manager of a municipally owned cable system in Shrewsbury, Massachusetts attended and testified at the hearing. Representatives of the three cable television companies were invited to not only testify but were also invited to ask questions of the other witnesses.

After considering the report of the various studies of Rice Associates, the advice of attorneys, the testimony and comments made during the public hearing, the City Council voted not to renew Madison's franchise, and not to grant a franchise to either Burke Cable Company, Ltd. or Catawba Valley Communications, Inc. Instead the City Council voted to proceed with a plan to construct and operate a municipally owned and operated cable television system. The Council did not foreclose the possibility that at some future date it might reconsider the question as to whether more than one cable system for the City would be in the public interest. Sometime thereafter Madison was advised to submit to the Council within ninety days (90) a plan for an orderly removal of its equipment from the city owned poles at the end of the franchise term as set forth in the franchise agreement.

Instead of submitting any plan for the removal of its equipment Madison brought this action seeking to prevent the City from requiring it to cease its cable operations in Morganton as provided under the franchise agreement. The complaint filed by Madison contains twelve claims for relief under both federal and state laws. The claims are as follows:

1. For a declaratory judgment that its request for franchise renewal is governed by Section 626 of the Cable Communications Policy Act of 1984, (Cable Act), 47 U.S.C.A. Section 546.

2. For judicial review of the City's decision not to renew its franchise pursuant to Sections 626 and 635 of the Cable Act, 47 U.S.C.A. Sections 546 and 555.

3. That the City violated Madison's rights guaranteed by the First and Fourteenth Amendments to the United States Constitution and Article I, Section 14 of the North Carolina Constitution.

4. That the City violated the equal protection clause of the Fourteenth Amendment to the United States Constitution.

5. That the City confiscated Madison's property without due process of law in violation of the Fifth and Fourteenth Amendment to the United States Constitution.

6. That the City violated Section 2 of the Sherman Act, 15 U.S.C.A. Section 2.

7. That the City violated the North Carolina Monopoly and Antitrust laws, N. C. Constitution, Art. 1, Sections 32 and 34 and N. C. Gen. Stat., Chap. 75.

8. That the Defendants deprived Madison of its constitutional rights in violation of 42 U.S.C.A. Section 1983.

9. That the Defendants interfered with Madison's contractual rights and relations.

10. That the Defendants breached the contract between Madison and the City.

11. That the City violated the public purpose requirements of the North Carolina Constitution by entering the public television cable business, and

12. That the City's option to purchase the franchisee's cable system at the expiration of the franchise is an unconstitutional and unenforceable provision of the franchise agreement.

The Defendants contend that there exist no genuine issues of fact, that the actions of the City have been reasonable and lawful and that they are entitled to judgment as a matter of law dismissing all of the claims filed by the Plaintiff. On the other hand the Plaintiff contends that there are genuine issues of material fact which must be tried by a jury.

Madison attached to its complaint a copy of the franchise agreement and the Defendants filed with the Court a copy of the proceedings before the City Council. Both sides filed affidavits and from the pleadings together with the exhibits and affidavits the Court determined at the May 16, 1986 hearing that no genuine issues of material fact existed as to the first two claims and entered an order dismissing those claims.

In view of the serious legal question as to whether the City could enter the cable television business under the North Carolina Constitution the Court abstained from ruling on the other claims until the issues could be determined by the North Carolina Courts. The Court denied the Defendants' motion for summary judgment on the other claims but retained jurisdiction of the case until the Supreme Court of North Carolina could act upon the state claims.

In an unanimous opinion filed December 7, 1989 the Supreme Court ruled as follows:

> In summary, we hold that the provisions of General Statutes, Chapter 160A, Article 16, Part 1 which authorize cities to finance, acquire, construct, own and operate a cable television system, do not violate the public purpose clause of the North Carolina Constitution and that the City of Morganton's refusal to grant cable television franchises to private applicants, including plaintiff, and its decision to build and operate a municipal cable system do not violate the exclusive emoluments and monopoly clauses of Article I, Sections 32 and 34 of our Constitution or the antimonopoly, or the unfair trade practices provisions of Chapter 75 of the North Carolina General Statutes. We further hold that the trial judge did not err in allowing summary judgment for the defendant city and in denying summary judgment for the plaintiff Madison Cablevision, Inc.

The Defendants then filed a motion in this Court for a reconsideration of the denial of their motion on claims three through twelve in light of the decision of the North Carolina Court. The Court scheduled a hearing on this motion and heard arguments of counsel in Rutherfordton, North Carolina on April 9, 1990 and allowed counsel ten days after the hearing to file any additional briefs or other matters.

The Court after a careful reexamination of the pleadings, briefs, documents, affidavits and arguments now enters its findings and conclusions.

The Court re-affirms its order dismissing claims one and two of the complaint for the reasons set forth in the memorandum and order dated July 3, 1986 and filed July 9, 1986. It is established by the record before the Court that there were less than 30 months remaining on Madison's franchise as of the effective date of the Cable Act and because the City began renewal proceedings prior to the date of its enactment, the Court concluded that as a matter of law the City was not required to conduct renewal proceedings in accordance with the Cable Act and that Madison is not entitled to the protection afforded existing franchisees under those renewal provisions. Madison's Cable Act claims were therefore dismissed.

The first question for the determination of the Court is whether the Defendants' motion for reconsideration by the Court of its order denying the motion for summary judgment on the remaining claims three through twelve in view of the decision of the North Carolina Supreme Court referred to above. Without a doubt the decision of the State Supreme Court resolving the most difficult claims alleged under state law places an entirely different light on the issues arising in this cause. The Court feels compelled now to grant the motion for reconsideration of its previous order and will proceed to determine whether summary judgment should be allowed as to the remaining claims advanced by Madison.

In considering a motion for summary judgment, the moving party has the burden of proof and the Court must assess the evidence in the light most favorable to the party opposing summary judgment. However, where a party has submitted a summary judgment motion with a sufficient evidentiary forecast, the party opposing the motion must respond with specific facts showing the existence of a genuine issue for trial. Conclusory allegations or legal conclusions will not serve to establish the existence of a genuine issue of material fact.

An examination of Madison's contentions shows that many of the issues involve only questions of law. Other "factual issues" rest on purely conclusory allegations. Madison's factual allegations about the Defendants' motives and intentions are irrelevant, and hence fail to raise issue of material fact.

Madison has submitted affidavits challenging the factual basis for the Council's decisions. It appears that it is contending that each factual finding made by the Council should be retried by a jury. However, the issue before the Court is not whether the Council made the right decision, but whether the evidence before the Council when it adopted the ordinance was adequate to support the decision. It must be remembered that the City Council of Morganton is a legislative body.

In *Wall Distributors, Inc. v. City of Newport News*, 782 F.2d 1165, 1169 (4th Cir. 1986), where there was a similar First Amendment challenge to the factual support of a city ordinance, the Court held:

> To have [a legislative] determination sustained against constitutional attack, a legislature is not bound to create an evidentiary record that would pass muster on plenary judicial review of legislation's necessity and fitness to achieve desired results. *Judicial review goes only to whether the legislative determination of justification and fitness is not*

facially without factual support, hence not arbitrary and capricious. (emphasis added)

See also City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S.Ct. 925, 930-31 (1986), (city could rely on factual studies made by other cities). In the case of *Major Media of Southeast, Inc. v. City of Raleigh*, 621 F. Supp. 1446, 1451-52 (E.D.N.C. 1985), the validity of and factual support for a billboard ordinance were challenged on First Amendment grounds, and the Court found that a lack of empirical studies and other evidence about traffic problems addressed in the ordinance did not create a factual issue for trial, and summary judgment in favor of the city was appropriate. *See also Town of Narrows v. Clear-View Cable TV, Inc.*, 315 S.E.2d 835 (Va), *cert. denied and appeal dismissed*, 105 S.Ct. 315 (1984). The Court held in this case that evidence proffered to Court cannot justify finding that City action was arbitrary, where evidence before the City Council supported the decision to revoke a cable franchise.

In the case at bar the Court finds that the record produced by Morganton supports the ordinance in question. The opportunity given to Madison to make its contentions and to present its evidence at the hearing before the City Council also lends support to this conclusion.

This conclusion is reinforced by the evidence offered by Madison at the hearing. Madison took the position at the hearing that only one cable company could survive in Morganton and that overbuilding the system there was impractical. The City's decision, rests in part upon Madison's representations in writing and the spoken word. The authority and ability to conduct a rational franchising process depends on local government's ability to develop and rely upon a record. To allow a franchisee to challenge the franchising process in Court on the basis of information which is contrary to information given earlier or which could have been presented, but was not, undermines cable regulation. Madison cannot now be

heard to complain that the City's decision to limit cable franchising in Morganton to one operator is factually without support when the Council's decision is supported by Madison's own factual representations before the Council at the hearing.

Giving the presentations of the parties all the weight to which they are entitled, the Defendants have met their burden under Rule 56, Federal Rules of Cicil Procedure. Madison has not responded with material sufficient to show there is a genuine issue for trial. For these reasons, resolving the remaining claims on Rule 12(b)(6) dismissal and summary judgment is appropriate without further discovery.

FIRST AMENDMENT, FREE SPEECH, AND CONSTITUTIONAL CONDITIONS

The third and twelfth claims for relief allege that the ordinance in question violates freedom of speech provisions of the federal and state constitutions. Madison contends that the City violated its First Amendment rights by failing to renew its franchise when it expired and by deciding that the City would construct and operate a government owned and operated cable television system. The effect of this contention is that Madison is entitled under the First Amendment to continue to operate its cable television system in the City of Morganton even though its twenty-year franchise has expired and it is entitled to continue to use the city owned poles and rights of way on a permanent or indefinite basis. Madison also contends that cable operations must be equated to newspaper publishing. These contentions stretch the First Amendment far beyond which any court has gone thus far.

The Court agrees with the reasoning of those courts which have determined that communities have a right to regulate cable to insure that optimum use is made of the public rights of way. *Omega Satellite Products Co.*

v. City of Indianapolis, 694 F.2d 119 (7th Cir. 1982); *Community Communications Co. v. City of Boulder*, 660 F.2d 1370 (10th Cir. 1981), *cert. denied*, 456 U.S. 1001 (1982). Particularly when, as in this case, there are limitations on the number of those claiming the right to communicate who can be accommodated, there is no absolute First Amendment right to communicate. *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 89 S.Ct. 1794 (1969). Madison also contends that cable operations must be equated to newspaper publishing. The law is that "differences in the characteristics of new media justify differences in the First Amendment standards applied to them." *Red Lion*, 395 U.S. at 386.

The complaint does not allege nor was there any evidence before the City Council to even suggest that the City sought to remove Madison because of the content or viewpoint of its cable television programming past, present or prospective. Accordingly, the City's legislative decicions not to franchise more than one cable operator and not to renew Madison's franchise, should be resolved under the test in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673 (1968):

> [A] government regulation is sufficiently justified if it is within the constitutional power of Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377.

Both the decision not to renew Madison's franchise and the decision to grant a single franchise relate to the City's control over public property. Control over its property is within the constitutional powers of a local government. *Adderley v. Florida*, 385 U.S. 39, 47; 87 S.Ct. 242 (1966).

The decision not to renew Madison's franchise furthers the following substantial government interest: the City's authority or duty in granting any franchise to enforce contracts and impose public service obligations on the franchisee, see *Shaw v. Asheville*, 269 N.C. 90 (1967); *Carolina-Tennessee Power Co. v. Hiawassee River Power Co.*, 175 N.C. 668, 677-78 (1918); the City's interest in preventing the dangers flowing from unregulated monopoly control over a scarce resource; and the City's interest in obtaining a system with enough channel capacity to provide and promote access to ensure diversity of speech and information services, see 47 U.S.C.A. Section 521(4).

The City Council found in the record from the evidence before it that Madison's past and proposed system would not serve these interests. Specifically, the Council found that Madison had not been candid in its representations to the City. This is directly related to whether Madison, as a potential future franchisee, would honor its public service obligations during any further franchise. This finding is supported by the fact that Madison denied that it had ever had a franchise revoked when in fact its franchise in Richland County, South Carolina had been revoked. The Council further found that its ability to obtain a modern communication system meeting community needs would not be served by renewing Madison's franchise, and that Madison's proposal would offer little opportunity for access, and related capacity to enhance the diversity of communications in the City. These findings are supported by the evidence before the Council including the findings and recommendations made by a cable consultant. The decision by the Council not to renew Madison's franchise was supported by the record.

The record before the Court discloses that the Council's decision to grant a single franchise furthers the following substantial government interests: prevention of disruption in city streets and rights of way, see *Community Communications Co. v. City of Boulder*, 660 F.2d 1370,

1377-78 (10th Cir. 1981), *cert. denied*, 456 U.S. 1001 (1982); conservation of the space on city utility poles, *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 104 S.Ct. 3065 (1984); and ensuring that public rights of way are optimally used, in a manner that serves the public interest.

The Council's decision directly relates the evidence before it to these interests. The Council found that "overbuilding will require significant replacement of city property and may result in disruption of other city services." The Council stated that it wished to conserve relevant resources and protect against safety and other problems which might arise in the future. The Council further found that overbuilding, as an economic matter, would create long-term problems with little benefit to the City and its citizens.

Finally, the non-renewal of Madison's franchise and the grant of only one franchise, by providing for access and similar channels of communications, while avoiding the harms of multiple systems and inadequate service, meet the final part of the *O'Brien* test. The Council's findings show that the City's interests would not be furthered by granting a franchise to Madison; they also show that the City would be more exposed to harm if there were multiple systems than with one system. This is enough. *Clark*, *supra*, 104 S.Ct. at 3071 and n.8.

The Council's decision not to franchise more than one cable operator clearly passes muster under *O'Brien* in light of the evidence before it, including the evidence offered by Madison. In response to the question in the Request for Information concerning the advantages and disadvantages of having more than one cable operator in Morganton Madison stated:

> (1) Very few cities can support more than one company . . . to grant more than one franchise ultimately may cause all but one to fail. . .

(2) If more than one company does survive . . . prices may have to go higher. . .

(3) . . . built-in inefficiencies exist in dual management costs [etc.], which will be paid for by the community.

(4) . . . service disruptions are likely to occur to existing cable subscribers. . .

(5) . . . additional companies means more unsightly cables on the poles. . .

(6) . . . the present facilities would require massive make-ready and pole replacements.

(7) We estimate that 90% of the poles would require extensive make-ready and over one-half of the poles would have to be replaced.

In addition, Madison submitted supplemental information stating that permitting an overbuild "could leave the City with a mess on their hands." Burke told the Council that the cost of make-ready and pole replacement to allow a second operator to provide service in Morganton, would be in excess of $500,000.00, and Catawba Cable told the Council that the costs would be astronomical. There was also evidence showing that overbuilding had led to safety problems in Granite Falls and nearby Drexel. Finally, Burke told the Council that two companies could not survive indefinitely, and that overbuilding would likely have a deleterious effect on service.

The Court notes further that evidence showing a substantial number of existing poles would have to be replaced is not contradicted by Madison's affidavits in opposition to the summary judgment motion.

Madison challenged these findings by submitting affidavits stating that, while there is not room for two systems on the utility poles now, the poles could easily be altered or replaced to accommodate additional systems. Because this Court has determined that the case should

be decided on the basis of the record before the Council, the affidavits are irrelevant. Madison contends that it is proper to permit introduction of additional information because in its opinion the Council did not conduct a full investigation into overbuilding. The record shows the Council asked for detailed information concerning overbuilding, including the "extent and nature" of the work that would be required to permit overbuilding. As found by the Court in another section of this opinion, *de novo* review is contrary to the Fourth Circuit's decision in *Wall Distributors, Inc. v. City of Newport News*, 782 F.2d 1165 (4th Cir. 1986). The City is not required to endure the harms it foresees from multiple systems because of Madison's First Amendment claims. *Wall Distributors, supra.* Therefore, the decisions challenged here not to renew Madison's franchise and not to grant multiple franchises satisfy the *O'Brien* standard as a matter of law.

Assuming *arguendo* that Madison's affidavits were relevant, they would fail to raise an issue of material fact requiring a trial. Accepting the allegations in the affidavits as true, the Court finds that it is evident that a substantial number of poles would have to be altered or replaced. The issue then would be whether Madison can demand that the City replace or renovate its utility poles so that a second cable operator can be accommodated in the future. This dispute is not a factual issue, but a legal question, and can be resolved on summary judgment, and must be resolved against Madison.

In any event, Madison has not challenged the evidence presented to the Council showing that the economic characteristics of cable in Morganton are such that granting two franchises would result in waste, deterioration of service and other harms; given cable's use of public property, the City's regulation of cable to avoid these harms is justified. See *Omega, supra*, 694 F.2d at 127-128.

In view of the fact that North Carolina courts follow the *O'Brien* test, see *County of Cumberland v. Eastern Federal Corp.*, 48 N.C.App. 518, 269 S.E.2d 672 (1980), the Court's analysis above of *O'Brien* means that Madison's free speech claims under the North Carolina Constitution must be dismissed.

Madison relies upon *City of Los Angeles v. Preferred*, 476 U.S. 488, 106 S.Ct. 2034, 90 L.Ed.2d 480 (1986), for support of its claims and for a denial of the motion for summary judgment. Madison also cites and relies upon *TCI of Key West v. United States*, 757 F.2d 1330 (D.C. Cir. 1985). In both *Preferred* and *Key West*, the First Amendment issues were considered under Rule 12 (b)(6). This Court is not restricted in its inquiry to the allegations in the complaint, as were the courts in *Key West* and *Preferred*, because the sufficiency of the claims are raised by summary judgment rather than on a motion to dismiss. The undisputed facts before the Court supply the information to this Court that was missing in these two cases.

In contrast to the situation in *Preferred*, here the City Council had a record before it from which it specifically found that economic and other harms will follow if there is more than one cable system in the City. And, again in contrast to *Preferred*, here the City Council found from the evidence including the statement of Madison, that there is not enough room on utility poles for more than one system, and in contrast to *Preferred* and *Key West*, here the decision was supported by evidence that Madison's proposal did not meet the community needs.

Madison's federal and state freedom of speech claims must be dismissed. The considerations which make the decision not to renew Madison's franchise reasonable also justify repurchase and other limitations on Madison's expired franchise. Those limitations do not constitute unconstitutional conditions and the twelfth claim must also be dismissed.

The ordinance on its face passes muster under the First Amendment. Madison offered affidavits in an attempt to show that City Council members acted with invidious motives, not appearing on the face of the ordinance on the record of the hearing before the Council. However, it has long been settled that it is not appropriate for courts to decide constitutional questions by engaging in a factual inquiry into legislative motives. *Daniel v. Family Security Life Ins. Co.*, 336 U.S. 220, 69 S.Ct. 550 (1949). This rules applies in First Amendment cases. *United States v. O'Brien*, 391 U.S. 367, 385, 88 S.Ct. 1673 (1968); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 930-31 (1986); *Wall Dist., supra.* Hence, the affidavits offered by Madison do not raise material issues of fact and the third and twelfth claims must be dismissed by way of summary judgment.

EQUAL PROTECTION

Madison raises in its fourth claim a series of equal protection issues. Because Morganton did not attempt to regulate the content of cable messages, and because the interests and concerns which make the City's action reasonable under the First Amendment also satisfy the standard of the Equal Protection Clause, the equal protection claims must also be dismissed. *City of Renton, supra; Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821, 831 (4th Cir. 1979), *cert. denied*, 447 U.S. 929 (1980).

Summary judgment is justified on each of the particular issues raised by Madison. Rate regulation is justified by the natural monopoly characteristics of cable identified above. Service requirements and fees may be imposed on the grantee of a franchise without violating the Equal Protection Clause. *Charlotte, Columbia and Augusta R.R. v. Gibbes*, 142 U.S. 386, 394-95, 12 S.Ct. 255 (1892). The repurchase option in Madison's franchise, whether or not exercised does not violate the Equal Protection Clause. *City and County of Denver v. New York Trust Co.*, 229

U.S. 123, 142-43, 33 S.Ct. 657 (1913). The City could regulate Madison's rates without similar rate regulation of its own rates. *Springfield Gas & Electric Co. v. City of Springfield*, 257 U.S. 66, 69, 42 S.Ct. 24 (1921). The City could impose a tax on Madison's operations without taxing its own enterprise. *Puget Sound Power & Light Co. v. Seattle*, 291 U.S. 619, 624, 54 S. Ct. 542 (1934). *City of Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369, 377, 94 S.Ct. 2291 (1974).

Madison contends that summary judgment is inappropriate because there are disputed issues of fact concerning the reasonableness of Morganton's legislative decisions and classifications. However, there was evidence before the City Council to support the decision it made. The Supreme Court stated in *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464, 101 S.Ct. 715 (1981) that

> Where there was evidence before the legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken.

Therefore, the Court holds that the equal protection claims are appropriately decided against Madison on summary judgment.

ANTITRUST CLAIMS

In its sixth and seventh claims, Madison alleges that various acts of the Defendants, allegedly made with the specific intent and inevitable effect of monopolizing the cable television market in Morganton, violate Section 2 of the Sherman Act, 15 U.S.C.A. Section 2 and Article I, Sections 32 and 34 of the North Carolina Constitution and of Chapter 75 of the North Carolina General Statutes.

The decision of the North Carolina Supreme Court on December 7, 1989 in *Madison Cablevision v. City of Morganton* laid to rest the claims presented in Madison's

seventh claim. The Court held that the state statute which authorized Morganton to finance, acquire, construct, own and operate a cable television system does not violate the public purpose clause of the North Carolina Constitution and that the City's refusal to grant cable television franchises to private applicants, including the Plaintiff and its decision to build and operate a municipal cable system do not violate Sections 32 and 34 of the North Carolina Constitution or the antimonopoly or the unfair trade practices provisions of Chapter 75 of the North Carolina General Statutes. This Court adopts the holding of the North Carolina Supreme Court and will grant summary judgment in favor of the City on the claims set forth in the seventh claim.

Short shrift can be made with the sixth claim. Even viewing the facts in the light most favorable to Madison, it is clear that Morganton and its agents are immune from antitrust liability because state law authorizes the Defendants' conduct in all respects, thus exempting them from antitrust liability under the "state action" doctrine. *Town of Hallie v. City of Eau Claire*, 477 U.S. 34, 105 S.Ct. 1713, 85 L.Ed.2d 25 (1985).

These claims will be dismissed by way of summary judgment as the City is entitled to a dismissal as a matter of law.

BREACH OF CONTRACT

In its tenth claim for relief, Madison alleges that the City's failure to renew its franchise constitutes a breach of contract. As Madison itself concedes, the contract grants no right to renewal and sets forth no procedure for renewal. In fact, the contract, clearly states that the franchisee shall remove its equipment from the city property at the end of the twenty-year franchise term. Apparently, Madison is alleging an obligation on the part of the City to renew the contract which arises by implication. In paragraph 76 of the complaint Madison alleges:

> The franchise contains no specific provision regarding procedures and standards to be followed for renewal of the franchise. Nevertheless, the contractual relation and the course of dealing between the parties establish upon the City an obligation of good faith and fair dealing.

In support of this contention Madison has offered the affidavit of Terrel E. Davis which sets forth in general terms that Madison had a "reasonable expectation of renewal based on its continuing communication with the City regarding renewal of its franchise." Mr. Davis then observes that the omission of a renewal provision from the franchise is "not unusual," and that the "vast majority of franchises lacking such provisions are extended or renewed pursuant to good faith negotiations between the parties." No documentation is provided in support of these assertions and conclusions. These unsupported and conclusory assertions or observations merely repeat the conclusory allegations of the complaint and are legally insufficient to establish the claim. There is evidence in the record that the City refused Madison's request in 1983 to grant a five-year extension in exchange for certain improvements in service. Douglas O. Bean testified by way of affidavit that in 1984 Madison was sent a letter advising that renewal was not guaranteed. Other affidavits indicate that much of the negotiations between the City and Madison revolved around the purchase by the City of Madison's equipment. So the evidence in the record does not support Madison's claim that it had a "reasonable expectation of renewal."

But assuming *arguendo* that what Mr. Davis concludes is true, the claim must fail. The materiality of Madison's asserted factual issue is necessarily dependent upon application of traditional rules of contract construction to the franchise at issue. The results claimed by Madison are contrary to the relevant authorities.

Under North Carolina law, the grant of a franchise to operate a cable television system is a special kind of right

not held by all persons in common. *Kornegay v. City of Raleigh*, 269 N.C. 155, 152 S.E.2d 186 (1967). Because of the governmental nature of the grant, the general rule is of strict construction against the franchise holder and in favor of the municipality. *Hill v. Elizabeth City*, 291 Fed.Rep. 194 (E.D.N.C. 1923), *affirmed*, 298 Fed. 67 (4th Cir. 1924); *see also Stillings v. City of Winston Salem*, 311 N.C. 689, 697, 319 S.E.2d 233 (1984). All rights asserted against the municipality must be clearly defined and not dependent on inference or presumption. *Hill, supra;* 12 McQuillin, Municipal Corporations, § 34.16a (3rd.Ed. 1970). Where a city has not by contract or otherwise restricted the exercise of its public powers, it is not to be shorn of its powers by "mere implication." *Water Co. v. Knoxville*, 200 U.S. 22, 23, 26 S.Ct. 224 (1906). Under this standard, Madison's claims that the "course of dealing" and "typical industry practice" gave rise to an implied right of renewal fails as a matter of law. The Court may not supply a renewal term to the franchise by "mere implication," as contended by Madison. *Water Co. v. Knoxville, supra.* 200 U.S. at 23.

In support of its breach of contract theory Madison asserts in conclusory fashion that the City's decision not to renew the franchise was arbitrary and capricious, and made in bad faith. These asserts are not sufficient to state a claim as a matter of law. The power of a municipality to grant, deny or renew franchises to public enterprises, including cable systems, is essentially legislative and discretionary. *Cablevision of Winston Salem v. Winston Salem*, 3 N.C.App. 252, 260, 164 S.E.2d 737, 742 (1968). Courts may not interfere with the exercise of legislative powers in the absence of a gross, oppressive, or manifest abuse of authority, or disregard of the law. *Clark's Greenville, Inc. v. West*, 268 N.C. 527, 151 S.E. 2d 5 (1966). Madison has made no factual allegation or offered proof of any material supporting the conclusory

allegations of "arbitrary and capricious" conduct or any lack of "good faith and fair dealing" on the part of the City Council.

But assuming *arguendo* that Madison's allegations state a claim, the ordinance, the Council's decision, and the record before the City Council demonstrate that the renewal decision was not arbitrary and capricious or tainted by bad faith and unfair dealings as those terms are defined by the North Carolina courts. *See In re Housing Authority of City of Salisbury*, 235 N.C. 463, 468, 70 S.E.2d 500, 503 (1952). It is shown by the record that Madison was given four opportunities to present its position to the City Council. These four occasions were (1) in its response to the "Request For Information," (2) through supplemental written information before the public hearing began; (3) through oral and written presentation at the public hearing with the right to testify, offer witnesses and to examine other witnesses; and (4) in its submission of further written material within 30 days after the public hearing. The record shows that the Council members heard and considered all the evidence presented and made their decision, and it appears that the decision was a reasonable one based upon the evidence. Thereafter, Madison's breach of contract claim fails.

TORTIOUS INTERFERENCE

Madison's ninth claim for relief, tortious interference with contract, fails to state a claim for the same reasons set forth under its breach of contract claim. Madison contends in its brief that the crucial issue with regard to its claim for tortious interference is whether the Defendants' actions are legally justified.

The facts necessary to resolve this claim are not in dispute. The franchise expired by its terms in October 1986, and as a matter of law, denial of renewal does not "interfere" with the contract relations between the City

and Madison under the expired franchise. Nor can Madison claim that there has been tortious interference with its relations and contracts with its subscribers by virtue of the City's refusal to renew the franchise. Nothing in the cable ordinance on its face either terminates or interferes with Madison's present relationship with its subscribers in contravention of rights under the expired franchise.

Madison could claim a "prospective advantageous relationship" sufficient to support such allegation only if it had a statutory or contract right to renewal of the franchise. Madison has neither right of renewal. It can enter into valid contracts with subscribers only to the extent it has authority to operate a cable franchise. As a matter of law the City does not tortiously interfere with those rights when it exercises its legal right to let the franchise expire. *See Coleman v. Whisnant*, 225 N.C. 494, 35 S.E.2d 647 (1945).

DUE PROCESS

In its fifth and tenth claims for relief Madison alleges that the City's actions will deprive it of its property, either directly through failure to renew the franchise (fifth claim) or indirectly through the City's proposed action in providing cable services itself (tenth claim). It contends that the property right at issue in these claims is its franchise to operate a cable television system in the City of Morganton.

As a general matter, a franchisee's property rights are not violated when a company whose franchise has expired is replaced by a publicly owned system. *City and County of Denver v. New York Trust Co.*, 229 U.S. 123, 142, 33 S.Ct. 657 (1913); *Newburyport Water Co. v. Newburyport*, 193 U.S. 561, 577, 24 S.Ct. 553 (1904). Moreover, the holder of an expired franchise has no greater right than the holder of an unexpired franchise. The rule with regard to revocation or annulment of an exist-

ing franchise is simply that the franchise is a property right which may not be terminated without due process. *Boyce v. City of Gastonia*, 227 N.C. 139, 41 S.E.2d 355, 359 (1947).

The Court has outlined above the procedure taken by the City Council to determine whether the franchise would be renewed and determined that its action was not arbitrary or capricious. Madison was afforded all the due process due it under federal and state law and the Constitutions.

Madison's contention that an indirect "taking" will result from the effect of City's "competition" with its franchise is without merit. Madison's reliance upon the case of *Walla Walla v. Walla Walla Water Co.*, 172 U.S. 1, 19 S.Ct. 77 (1898) in support of its contention that a "taking" results from the action of a municipality in competing with its franchisee is misplaced. The franchise at issue in *Walla Walla* was in effect during the time of the City's action and specifically prohibited the City from establishing its own water system, except upon the failure of the water company to adequately serve the public under its franchise. At the time the City proposed to establish its own water system, this contractual condition had not been satisfied. In contrast, Madison's franchise expired and the City has not yet built its cable system because of this litigation, and the franchise in the case at bar contains no provision preventing Morganton from competing with Madison.

The North Carolina Supreme Court in *Stillings v. City of Winston Salem, supra*, (1984) held that a commercial service franchise does not provide protection to the holder against government service which would compete with it, notwithstanding that the value of the franchise is diminished or destroyed by such competition. *See also Bridge Co. v. United States*, 105 U.S. 470 (1882), and *Skaneateles Water Works Co. v. Skaneateles*, 184 U.S.

354, 22 S.Ct. 400 (1902). Accordingly, Madison has no property right, or the expectation of a renewed property right, which would be "taken" by the action of the City Council of Morganton in voting to provide cable service to its citizens.

Madison's contention that expenditures made to upgrade its cable system based on its unilateral expectation of extension of its franchise create property rights entitled to protection is without merit. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161, 101 S.Ct. 446 (1980). Even if all the facts alleged by Madison were true it has alleged nothing which would make its investment of money reasonable in light of the impending expiration of its franchise. To the contrary the record before the Court indicates without question that it was unreasonable as a matter of law for Madison to upgrade its system on the basis of an unilateral expectation of renewal. Expenditures based on unilateral expectations do not create property rights. *Bridge Co. v. United States, supra.*

The Court concludes that Madison has lost no property interest protected by state law and therefore its constitutional claims alleging deprivation of property without due process are without merit. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984). If the City elects to insist upon enforcing the provision of the franchise giving it the option to purchase Madison's equipment the parties would have to agree upon the value or a court of competent jurisdiction would determine such issue.

CIVIL RIGHTS

Madison set forth in its eighth claim that Defendants have violated its civil rights under 42 U.S.C.A. Section 1983. The individual Defendants who are Council members and Mayor of the City of Morganton would be im-

mune from suit for their legislative acts under Section 1983, but they are not sued in their individual capacity. The Court has determined that the Defendants are entitled to judgment in their favor on all the claims advanced by Madison. Therefore, the eighth claim states no claim for relief itself. *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 618, 99 S.Ct. 1905 (1979). *Pleasant View Elementary School PTA v. Group 1 Defendants*, 763 F.2d 652, 655 (4th Cir. 1985).

Madison's eleventh claim is that the City violated the public purpose requirements of the North Carolina Constitution by entering the public cable television business. As set forth above the North Carolina Supreme Court ruled against Madison on this issue and this Court adopts the ruling and will therefore dismiss the claim.

At the hearing on April 9, 1990 Madison moved to amend the complaint by striking claims seven and eleven and adding a new claim. Since the Court and counsel for the Defendants had not seen the proposed amendment, the Court delayed ruling on the motion. It appears that Madison desires to file an amended complaint consisting of twenty-five pages, with ninety-four numbered paragraphs and two and one-half pages of "prayer for relief." The Court will deny the motion to amend for the following reasons: (1) the proposed amended complaint does not conform to Rule 8(a)(2), Federal Rules of Civil Procedure which requires a "short and plain statement of the claims . . .;" (2) this litigation was instituted on January 6, 1986 and Madison has continued to operate its cable system in Morganton since its franchise expired on October 25, 1986 and further delay should not be permitted. Madison had from December 7, 1989, when the Supreme Court decision was rendered until April 9, 1990 to move for amendment but waited until the day of the hearing to offer the amended complaint.

The Court is aware of and follows the rule that amendments should be freely allowed but in the interest of

fairness and justice the Court will exercise its discretion and deny the motion to file an amended complaint at this late date.

The Court finds and concludes that there is no genuine issue of any material fact and the Defendants are entitled to a judgment of dismissal of all the claims set forth in the complaint as a matter of law. A judgment of dismissal of all the claims will be entered simultaneously herewith.

This the 11th day of May, 1990.

/s/ Woodrow W. Jones
United States District Judge

APPENDIX D

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION

SH-C-86-5

MADISON CABLEVISION, INC.,
a Delaware corporation,

Plaintiff,

v.

THE CITY OF MORGANTON, NORTH CAROLINA; MAYOR MEL COHEN, in his official capacity; CITY MANAGER DOUGLAS O. BEAN, in his official capacity; and COUNCIL MEMBERS ROBERT H. CHOATE, MOLLIE M. DARWIN, ALFRED W. HAMER, JR., and DANNY LINGERFELT, in their official capacities,

Defendants.

MEMORANDUM AND ORDER

[Filed Jul. 9, 1986]

Plaintiff brought this action seeking declaratory, injunctive, and monetary relief against Defendants for alleged violation of its rights under federal and state law. The Plaintiff presently owns and operates cable television systems in Morganton, Valdese, and portions of Burke County, North Carolina. The Defendants are the City of Morganton, its mayor and city manager and the elected members of its city council. The matter is before the Court upon Defendants' motions to dismiss and for summary judgment. The Court heard the motions in Ashe-

ville, North Carolina on May 16, 1986. After careful consideration of the record, briefs and arguments of counsel the Court now enters its findings and conclusions.

In October 1966 the City of Morganton, North Carolina (Morganton or City), through its city council, adopted an ordinance granting Morganton TV Cable, Inc. a non-exclusive franchise to construct and operate a cable television system in Morganton. The franchise was for a period of twenty years. Morganton TV Cable, Inc. subsequently transferred its interest in the franchise to Suburban Cablevision, Inc., which thereafter transferred its interest to Madison Cablevision, Inc. (Madison), the Plaintiff herein. The assignment and transfer of the franchise to Madison was approved by resolution of the City dated July 29, 1974. Madison has operated a cable television service in Morganton at all times since December 1974. By the terms of the franchise it is due to expire, if not renewed, on or about October 25, 1986.

The franchise provides no right to renewal and contains no provisions regarding procedures for renewal. It does grant the City an option to purchase the property of the franchisee at the expiration of the franchise or any renewal thereof. It further provides that upon termination of the franchise the franchisee shall remove its posts, poles and television transmission and distribution system from City property and rights of way.

In December 1983 Madison submitted a proposal to the City for renewal of its franchise. That proposal was denied. At about the same time the City began to gather information concerning the future of cable television in Morganton. Rice Associates, an independent consulting firm from Washington, D.C., and Spiegel & McDiarmid, a Washington, D.C. law firm, were hired by the City to assist in its study of cable television for Morganton. Rice Associates made three studies which concluded that the system then existing in the City was inadequate; that the City needed a modern cable communications system;

and that a City-owned and operated cable system was feasible.

On September 24, 1984, after reviewing the Rice studies, Morganton issued a Request for Information (RFI) to the general public. Copies of the RFI were provided to Madison, Burke Cable Co., Ltd. and Catawba Valley Communications, Inc. Those were the only private cable companies to have expressed any interest in providing cable television service for Morganton at that time. The RFI stated that a public hearing would be held on November 14, 1984 for the purposes of:

> (a) determining whether the franchise then held by Madison should be renewed;
>
> (b) determining whether other private cable companies were interested and capable of providing cable service in Morganton;
>
> (c) determining whether Morganton should establish a municipal cable system;
>
> (d) determining whether there was any interest in an overbuild of the cable system then existing in the City; and,
>
> (e) determining whether more than one cable system in the City was practical.

Madison, Burke Cable Co., Ltd. and Catawba Valley Communications, Inc. all responded to the RFI on October 26, 1984. The public hearing was held on November 14, 1984 as planned.

At the hearing representatives of each of the three cable television companies, as well as members of the general public, were given the opportunity to make comments. City employees, the president of Rice Associates, and the manager of a municipally owned cable system in Shrewsbury, Massachusetts also spoke at the hearing.

After considering the reports of the various studies performed by Rice Associates and Spiegel and McDiar-

mid and the comments made during the public hearing, the city council decided not to renew Madison's franchise, not to award a franchise to either Burke Cable Co., Ltd. or Catawba Valley Communications, Inc. and to proceed with the construction of a municipally owned and operated cable television system. The city council did not foreclose the possibility that at some future date it might reconsider whether more than one cable system for the City was in the public interest. By ordinance dated September 9, 1985 Madison was given 90 days to submit a plan to the City for orderly removal of its equipment from City poles at the end of the franchise term.

Madison brought this action seeking to prevent the City from requiring it to cease its cable operations in Morganton. Its complaint is comprised of 12 claims for relief under both federal and state law. The first claim for relief is for a declaratory judgment that its request for franchise renewal is governed by Section 626 of the Cable Communications Policy Act of 1984, (Cable Act), 47 U.S.C.A. § 546. Its second claim for relief is for judicial review of the City's decision not to renew its franchise pursuant to Sections 626 and 635 of the Cable Act (47 U.S.C.A. §§ 546 and 555). In its third claim for relief Madison alleges violation of rights guaranteed by the First and Fourteenth Amendments to the United States Constitution and Article I, Section 14 of the North Carolina Constitution. In its fourth claim for relief Madison alleges violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution. Its fifth claim for relief alleges confiscation of property without due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution. The sixth and seventh claims for relief allege respectively attempted monopolization in violation of Section 2 of the Sherman Act, 15 U.S.C.A. § 2, and violation of North Carolina monopoly and antitrust laws, N.C. Const. Art. 1, §§ 32 and 34 and N.C.Gen.Stat., Chap. 75.

The eighth claim for relief alleges deprivation of Madison's constitutional rights in violation of 42 U.S.C.A. § 1983. In its ninth and tenth claims for relief Madison alleges common law claims of interference with contractual relations and breach of contract. The eleventh claim for relief alleges violation of the public purpose requirement of the North Carolina Constitution, Article V, Section 2(1). In its twelfth claim for relief Madison alleges that the City's option to purchase the franchisee's cable system at the expiration of the franchise is an unconstitutional, and therefore unenforceable, provision of the franchise agreement.

The Defendants contend that there exist no genuine issues of material fact, that the actions taken by the City have been reasonable and lawful, and that they are entitled to judgment as a matter of law dismissing the Plaintiff's complaint. Plaintiff contends that there are genuine issues of material fact which must be tried by a jury.

The Court first considers the applicability of the franchise renewal provisions of the Cable Act in this case. The Cable Act, Pub. L. No. 98-549, 98 Stat. 2779 (1984), was enacted for several purposes, including establishment of a national policy concerning cable communications, promotion of competition in cable communications and protection of cable operators against unfair denials of franchise renewal. 47 U.S.C.A. § 521. The act became effective December 29, 1984. Pub. L. No. 98-549 § 9(a), 98 Stat. 2779 at 2806 (1984).

Madison contends that it is entitled to the franchise renewal protections afforded by the Cable Act, 47 U.S.C.A. § 546. These protections include, *inter alia*, the right to a public hearing, the right to introduce evidence and question witnesses at such hearing and the right to franchise renewal absent one or more specified adverse findings which must be supported by a preponderance of

the evidence. The franchise renewal provisions of 47 U.S.C.A. § 546 are optional, except that upon request of the franchisee the renewal provisions are mandatory. The time for beginning franchise renewal proceedings is the 36th to 30th month before franchise expiration. 47 U.S.C.A. § 546(a). By implication at least, where a cable operator fails to request renewal proceedings in accordance with the Cable Act prior to the 30th month before franchise expiration it waives its right to such proceedings.

Madison's franchise expires in October 1986, some 22 months after the December 1984 effective date of the Cable Act. As of December 1984, there was insufficient time to conduct franchise renewal proceedings pursuant to the timetable of 47 U.S.C.A. § 546. Congress provided for no transitional renewal provisions for those franchises which were already within 30 months of expiration as of the effective date of the Act. Failure to provide for such situations was not simply an oversight. The legislative history of the Cable Act shows that the House Committee was aware that the Act contained no transitional renewal provision. H.Rep. No. 934, 98th Cong., 2d Sess. at 72 (1984). The legislative history further shows that the renewal provisions were not meant to apply retroactively where a franchise due for renewal less than 30 months after passage of the Act was already subject to renewal proceedings prior to enactment. *Id.*

Because there were less than 30 months remaining on Madison's franchise as of the effective date of the Cable Act, and because the City had begun renewal proceedings prior to the date of its enactment, the Court concludes that the City is not required to conduct renewal proceedings in accordance with the Cable Act and that Madison is not entitled to the protection afforded existing franchisees under those renewal provisions. Madison's Cable Act claims must therefore be dismissed.

Having determined that the renewal provisions of the Cable Act are not applicable in this case the Court further concludes that it should abstain from deciding Madison's federal constitutional claims pending submission of its non-federal claims to the courts of the State of North Carolina.

Abstention is the abdication or postponement of federal jurisdiction to accommodate state court adjudication. *Cox v. Planning District I Community Mental Health and Mental Retardation Services Board*, 669 F.2d 940, 942 (4th Cir. 1982). The doctrine of abstention is founded upon the recognition that in our federal system of government the federal judiciary should accord "scrupulous regard for the rightful independence of the state governments" by avoiding needless federal conflict with state policy. *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). Although considered an exception and not the rule, *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483 (1976), abstention has been upheld, and at times mandated, in at least four categories of cases. *See, Cox v. Planning District I, supra. See, also*, 17 C. Wright, A. Miller, E. Cooper, Federal Practice and Procedure § 4241 (1978). In *Railroad Commission v. Pullman Co., supra*, the Supreme Court held that abstention is required in cases where a federal constitutional decision might be avoided or presented in a different posture by a ruling on a dispositive matter of unsettled state law. Abstention is also proper in cases where there is a likelihood that a comprehensive state administrative process will be disrupted by federal adjudication, *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943), or where difficult questions of state law regarding important matters of public policy have been presented. *Colorado River Water Conservation District v. United States, supra*, 424 U.S. at 814, 96 S.Ct. at 1244, *citing, Louisiana Power and Light Co. v. City of Thibo-*

daux, 360 U.S. 25, 79 S.Ct. 1070, 3 L.Ed.2d 1058 (1959). Abstention is generally required where a party seeks an injunction against ongoing state proceedings. *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.* 54 U.S.L.W. 4860 (U.S. June 27, 1986). Finally, a federal court may abstain where there is also pending a state court litigation of the same extraordinarily important issues. *Colorado River Water Conservation District v. United States, supra.*

In its eleventh claim for relief Madison raises the difficult and unsettled issue of whether a municipality may, consistent with the Constitution and laws of the State of North Carolina, own and operate a cable television system when there are private operators willing to undertake the enterprise. Morganton contends that it is given express statutory authority to own and operate a cable television system by N.C.Gen.Stat. §§ 160A-311 and 312. A simple reading of those statutes seems to support Morganton's contention. However, Article V, Section 2(1) of the North Carolina Constitution provides that "[t]he power of taxation shall be exercised . . . for public purposes only . . ." This limitation on the power to tax has been found to limit the power to spend from the public treasury as well. *Mitchell v. North Carolina Industrial Development Financing Authority*, 273 N.C. 137, 143, 159 S.E.2d 745 (1968).

In *Stanley v. Department of Conservation and Development*, 284 N.C. 15, 32-33, 199 S.E.2d 641 (1973), Justice Sharp writing for a unanimous court, stated the following rule:

> A municipal corporation, . . . even with legislative sanction, cannot engage in a private enterprise or assume any function which is not in a legal sense public in nature. (citations omitted)
>
> * * * *
>
> An activity cannot be for a public purpose unless it is properly the "business of government," and it is

> not a function of government either to engage in private business itself or to aid particular business ventures. *See* Note, 49 N.C.L. Rev. 830, 833 (1971). It is only when private enterprise has demonstrated its inability or unwillingness to meet a public necessity that government is permitted to invade the private sector.

In *Keeter v. Town of Lake Lure*, 264 N.C. 252, 264, 141 S.E.2d 634 (1965), the Court concluded that there could be no precise judicial definition of a public, as distinguished from a private purpose. Instead each case must be determined by its own peculiar circumstances as of the time it arises. The concept of public purpose

> expands with the population, economy, scientific knowledge, and changing conditions. As people are brought closer together in congested areas, the public welfare requires governmental operation of facilities which were once considered exclusively private enterprises, (citation omitted) and necessitates the expenditure of tax funds for purposes which, in an earlier day, were not classified as public.

Mitchell v. North Carolina Industrial Development Financing Authority, supra, 273 N.C. at 144. Thus the issue of whether a proposed government expenditure is for a public or a private purpose is by its nature a matter of unsettled state law. The issue of whether Morganton may own and operate a cable television service is even more unsettled because the Supreme Court of North Carolina has not yet considered whether cable television is properly the "business of government."

In addition to its claim that state law prohibits Morganton from owning and operating a cable television system, Madison claims that Morganton's denial of its request for a franchise to operate a cable television system violates its rights under the First and Fourteenth Amendments to the Constitution of the United States. In deciding the federal constitutional issue the Court must

necessarily consider the meaning and validity of N.C. Gen.Stat. §§ 160A-311 and 312. The Supreme Court of North Carolina, if presented with the issue, might conceivably hold that insofar as N.C.Gen.Stat. §§ 160A-311 and 312 permit cities to own and operate cable television systems, the statutes are contrary to the North Carolina Constitution. It might also hold, as Plaintiff contends, that those statutes permit a city to provide cable television service to its residents only if no private operator is willing to provide such service. Of course this Court could decide the issue based upon its prediction of how the North Carolina Supreme Court would rule. But such a decision would be a tentative answer which might subsequently be displaced by an authoritative state adjudication. *Railroad Commission v. Pullman Co., supra*, at 500, 61 S.Ct. at 645.

The Court recognizes that a ruling by the North Carolina Supreme Court on the state-law issues will not necessarily be dispositive of the entire case. Morganton argues that even if it had decided against municipal ownership of a cable television system, it would not have renewed Madison's franchise. It says that it would have awarded a franchise to one of the other two applicants instead. According to the City, both Burke Cable Co., Ltd. and Catawba Valley Communications, Inc. proposed a better system than did Madison. Therefore, even if the North Carolina Supreme Court should rule that Morganton may not provide cable television service for its residents, this Court may still have to consider whether Morganton may constitutionally deny Madison the franchise it seeks. However the posture of this action will be considerably different if the North Carolina Supreme Court holds in Madison's favor. Pullman-type abstention is therefore appropriate in this case.

Additionally, it appears that the Burford-type abstention recognized in *Louisiana Power & Light Co. v. City of Thibodaux, supra*, is proper in this case. There the the City of Thibodaux sought to expropriate certain land,

buildings, and equipment owned by the Louisiana Power & Light Company. A Louisiana statute seemed to grant the authority for the city to take the power company's property. However, a decision by the Attorney General of Louisiana in a similar case concluded that the city did not have the power claimed by the City of Thibodaux. The Louisiana Supreme Court had never interpreted the statute. The Supreme Court upheld the District Court's order of abstention on grounds that the eminent domain proceeding there in issue was "a matter close to the political interests of a State" and that the District Court had therefore appropriately exercised its discretion in staying proceedings pending authoritative interpretation of the state statute by the Supreme Court of Louisiana. *Id.* at 29-30, 79 S.Ct. at 1073-74. This holding has subsequently been determined to permit abstention where "there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar." *Colorado River Water Conservation District v. United States, supra*, at 814, 96 S.Ct. at 1244.

Madison argues that the proposed municipal ownership of a cable television system violates not only the public purpose requirement of the North Carolina Constitution, but also violates the State's Unfair and Deceptive Trade Practices Act, N.C.Gen.Stat., Chap. 75, and the North Carolina Constitution's prohibitions against the granting of exclusive emoluments and privileges and against perpetuities and monopolies. N.C.Const. Art. I, §§ 32 and 34. The answers to all these questions are bound to have an impact in this State beyond the parties to this action. Any city or other local governmental unit which might consider the feasibility of owning its own cable television system would have to consider whether its proposed action would be in violation of the Constitution and laws of North Carolina. If at some time in the future the North Carolina Supreme Court decided the issues differently from the way this Court might predict it would

the rights of all future litigants would be different from the rights of these parties. *See, Louisiana Power & Light Co. v. City of Thibodaux, supra* at 30, 79 S.Ct. at 1073. Because of the potentially far-reaching impact of the answers to the state-law issues raised in this case and because these questions bear on important policy questions of sovereign prerogative, the Court concludes that Burford-type abstention is also appropriate in this case.

Whether the Court abstains under the *Pullman* doctrine or the *Burford* doctrine is of no great significance substantively. However, the procedural consequences vary significantly depending upon the basis for abstention. If abstention is based upon *Pullman* the federal district courts retain jurisdiction of the case and merely stay proceedings pending state court adjudication. *Cox v. Planning District I, supra.* But, if abstention is based upon *Burford* and its progeny the district court ordinarily dismisses the action outright. *Id.* Professors Wright, Miller and Cooper also recommend dismissal when abstention is justified under both *Pullman* and *Burford.* 17 C. Wright, A. Miller, E. Cooper, Federal Practice and Procedure § 4245 (1978).

However, as in *Cox v. Planning District I, supra,* there is present in this case primarily a question of unsettled state law. *See, also Ratcliff v. County of Buncombe,* 759 F.2d 1183 (4th Cir. 1985). The case does not involve an elaborate and comprehensive scheme of state regulation and review. Moreover, even if the North Carolina Supreme Court should rule completely in Madison's favor, that would simply put Morganton out of the cable television business. The City might then choose to award a franchise to one or more of Madison's competitors, but not to Madison, leaving Madison's First Amendment and other federal claims viable. Under all the circumstances the Court concludes that this action should be retained on the docket until the conclusion of state proceedings.

There may of course be some delay incident to the procedure proposed by the Court. That delay need not be inordinate however. The facts necessary for the determination of Plaintiff's state-law claims are essentially undisputed. The Court fully anticipates that a trial will be unnecessary in the state proceedings. The inconvenience to the parties of a short delay in the final resolution of this matter is outweighed by public benefit to be gained by an authoritative rather than a tentative resolution of the state-law issues arising in this action.

Based upon the foregoing findings and conclusions:

IT IS, THEREFORE, ORDERED that Defendants' motion to dismiss Claims 1 and 2 of the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure be and the same is hereby granted, and Plaintiff's First and Second Claims for Relief are hereby dismissed;

IT IS FURTHER ORDERED that Defendants' motion to dismiss Claims 3 through 12, inclusive, of the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and their motion for summary judgment as to such claims pursuant to Rule 56 of the Federal Rules of Civil Procedure be and the same are hereby denied;

IT IS FURTHER ORDERED that future proceedings in this matter be stayed pending resolution of the state court proceedings contemplated by this Memorandum and Order. The Plaintiff should file its complaint in state court forthwith.

The Clerk is directed to retain this action on the Court's docket in an inactive status.

This the 3rd day of July, 1986.

/s/ Woodrow W. Jones
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION

Civil Action No. SH-C-86-5

MADISON CABLEVISION, INC.,
a Delaware corporation,
Plaintiff,

vs.

THE CITY OF MORGANTON, NORTH CAROLINA; MAYOR MEL COHEN, in his official capacity; CITY MANAGER DOUGLAS O. BEAN, in his official capacity; and COUNCIL MEMBERS ROBERT H. CHOATE, MOLLIE M. DARWIN, ALFRED W. HAMER, JR., and DANNY LINGERFELT, in their official capacities,
Defendants.

ORDER

[Filed Sep. 22, 1986]

THIS MATTER is before the Court upon the request of the defendant, and the Court having reviewed the file in this matter and finding that entry of an order is necessary to determine the rights of the parties during the pendency of the litigation,

IT IS, THEREFORE, ORDERED as follows:

1. Subject to further order of this Court, the terms of this Order shall apply pending a final resolution by the courts of the State of North Carolina of the action filed by plaintiff at the direction of this Court and during

the course of any subsequent proceedings before this Court.

2. Notwithstanding the expiration of plaintiff's franchise to furnish cable television service to subscribers within the jurisdiction of the City of Morganton, plaintiff shall be permitted to continue to furnish cable television service to such subscribers under the terms and conditions of the current franchise and applicable state and federal law.

3. The entry of this Order, and the parties compliance therewith, shall be without prejudice to the respective rights and legal positions of the parties, except that plaintiff's continued operations in Morganton shall be pursuant to a permissive holdover term of the current franchise.

IT IS SO ORDERED this 19th day of September, 1986.

/s/ Woodrow W. Jones
WOODROW W. JONES
United States District Judge

Supreme Court, U.S.
FILED
MAR 31 1992
OFFICE OF THE CLERK

(2)

No. 91-1348

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

MADISON CABLEVISION, INC.,
Petitioner,
v.
THE CITY OF MORGANTON, NORTH CAROLINA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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QUESTIONS PRESENTED

1. Whether the First Amendment prohibits a city from choosing to operate its own cable television system, when that system is demonstrably superior to one proposed by the incumbent operator, where the market cannot now support more than one system.

2. Whether the First Amendment gives a disappointed cable television franchise applicant the right to have a federal court review the city's decision, not on the record before the city, but on the basis of affidavits contrary to evidence the applicant presented during the franchising process.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The First Amendment to the United States Constitution provides in relevant part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

The Cable Communications Policy Act of 1984, 47 U.S.C. § 521 *et seq.*, provides in relevant part that:

> A franchising authority may award . . . 1 or more franchises within its jurisdiction. 47 U.S.C. § 541(a)(1).
>
> [A] State or franchising authority may hold any ownership interest in any cable system. 47 U.S.C. § 533(e)(1).
>
> Any State or franchising authority shall not exercise any editorial control regarding the content of any

> cable service on a cable system in which such governmental entity holds ownership interest . . . unless such control is exercised through an entity separate from the franchising authority. 47 U.S.C. § 533(e)(2).

STATEMENT

The facts in this case are set forth in two decisions of the district court, Petition Appendix A ("Pet. App.") at 5a-11a, 33a-36a, and in the decision of the North Carolina Supreme Court in *Madison Cablevision v. City of Morganton*, 325 N.C. 634, 636-41, 386 S.E.2d 200, 203-04 (1989). Without explanation, the Statement of Petitioner Madison Cablevision, Inc. ("Madison")[1] departs from the record and from the undisputed facts as found by the state and federal courts.

1. *The cable franchising process in Morganton.*

Madison provided cable television service in the City of Morganton pursuant to a non-exclusive, twenty-year franchise contract. Pursuant to the franchise contract, Madison placed wires on city-owned poles and constructed other facilities in public easements, rights of way, and on city-owned property. 325 N.C. at 638, 386 S.E.2d at 203. The franchise did not include any renewal provision and instead gave the City the option either to purchase the system at the end of the contract term or to require Madison to remove its system. The franchise was scheduled to expire in October, 1986. Pet. App. 34a.

In late 1983, the City began to gather information and develop procedures for determining the future of cable television in Morganton. The City hired an independent

---

[1] Madison is wholly owned by Tele-Communications, Inc. ("TCI"), which is a party to the proceedings below. During the renewal process, TCI supplied the renewal proposal and other information to Morganton. In the record of the proceedings before the City, Madison was often referred to as TCI; references in that record to TCI are references to Madison, and vice versa.

consulting firm and commissioned three studies: (1) an analysis of comparable cable systems; (2) a study of local cable-related needs and interests; and (3) a municipal cable television feasibility study. *Id.* at 34a. The City told Madison that studies were being performed and that the first two studies would be completed by April, 1984. Each of the three studies was available for public review on completion. 325 N.C. at 639, 386 S.E.2d at 203.[2] Collectively, the studies indicated that the cable system then existing in the City was inadequate, that the City needed a modern cable communications system, and that a City-owned and City-operated system was feasible. *Id.*[3]

On September 24, 1984, after reviewing the three studies, the City issued a Request for Information ("RFI") to the general public and provided copies of the RFI to three private cable companies which had expressed an interest in providing cable service to the City—Madison, Burke Cable Company, Ltd. ("Burke"), and Catawba Valley Cable TV ("Catawba"). The RFI stated that a public hearing would be held on November 14, 1984 to (Pet. App. 35a):

(a) determine "whether the franchise then held by Madison Cable should be renewed;"

(b) determine if "other private cable companies were interested and capable of providing cable service in the City of Morganton;"

(c) determine "whether Morganton should establish a municipal cable television system;"

---

[2] When Madison states (Pet. 3) that "[n]either Madison nor the public were informed about the consultants' conclusions" it must mean that it chose not to examine these public record documents, all of which were available by August, 1984.

[3] Madison states that the municipal feasibility study "assumed" the City would capture all of Madison's subscribers. Pet. 3. No such assumption was made: the study considered whether a municipal system would be financially viable at various levels of subscribership. Court of Appeals Appendix ("C.A. App.") 729-30.

(d) determine if "there was any interest" in construction of a second cable system; and

(e) determine if the City of Morganton could reasonably support more than one cable system in the long term.

These companies and the public were invited to comment on the City's studies, to describe the advantages and disadvantages of municipal ownership and to submit information concerning the feasibility of a second cable system in Morganton (a practice known as "overbuilding"). Each responding cable company was invited to submit a proposal describing the cable system it intended to build if it were granted a franchise. 325 N.C. at 640, 386 S.E.2d at 203. Because the City's studies were available for review, each applicant was in a position to know what types of systems the City believed would satisfy its needs, and had the opportunity to tailor its proposal accordingly.

Every applicant had reason to prepare its proposal with care. The RFI stated that "the City intends to rely on responses to this information request and statements at the hearing in making determinations as to the future of cable service in Morganton," so that "while operators are free to participate or not participate, and to present a detailed or general proposal as desired, the completeness and timeliness of a presentation may affect the City Council's ultimate determinations." C.A. App. 386.

Madison, Burke and Catawba responded in writing to the RFI, and each appeared at the public hearing. At the hearing, the City introduced copies of its consultant's reports, the written submissions of the cable companies, complaints received from the public, reports prepared by the City staff and a notebook containing clippings concerning Madison and the other applicants. The public, the cable companies and the City staff then made oral

presentations and questioned one another. Pet. App. 8a-9a.

Madison actively participated in the proceedings. It submitted a 759-page response to the RFI. At the hearing, Madison's three representatives presented prepared statements and asked questions of the City staff and consultants. Madison had a court reporter record the proceedings.

Madison was particularly vocal on the issue of whether the public rights of way in Morganton could support more than one cable system. Madison told the City Council that if two cable franchises were issued:

- "We estimate that 90% of the poles would require extensive make-ready" and over "one-half of the poles would have to be replaced."
- " . . . the present facilities would require massive make-ready and pole replacements."
- ". . . service disruptions are likely to occur to existing cable subscribers when more than one cable company exists in a community . . ."

In addition, Madison told the City that:

- ". . . very few cities can support more than one company . . . to grant more than one franchise ultimately may cause all but one to fail."
- "If more than one company does survive . . . prices may have to go higher . . .
- ". . . Built-in inefficiencies exist in dual management costs [etc.], which will be paid for by the community."
- ". . . additional companies mean more unsightly cables on the poles . . ."
- ". . . every experience the Company has ever had indicates overbuilding results in one company surviving and increased cost to subscribers."

Pet. App. 18a-19a.

At the end of the hearing, the cable companies were given an opportunity to submit additional material and to respond to any evidence that had been presented. 325 N.C. at 640, 386 S.E.2d at 204.[4] Each company was invited to raise any procedural issues it believed significant. In its post-hearing submission, Madison did not criticize the process, but noted that it "was very pleased with the way the meeting went on November 14." C.A. App. 549.

Madison re-emphasized that no "*reputable* cable operators" (emphasis in original) would recommend authorizing a second cable system. It warned that if a second cable system was authorized, the City could be left "with a mess on their hands." Pet. App. 19a.

The City took the renewal issues under advisement. On March 28, 1985, a draft decision was sent to Madison. Madison asked the City to delay formal adoption of the decision to give the City and Madison an opportunity to settle issues. C.A. App. 249-255. The City delayed adoption, but Madison and the City were unable to settle matters.[5]

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[4] As the district judge found, Madison was given "four opportunities" to present its case to the City. These were:

> (1) in its response to the Request for Information, (2) through supplemental written information before the public hearing began; (3) through oral and written presentation at the public hearing with the right to testify, offer witnesses and to examine other witnesses; and (4) in its submission of further written material within 30 days after the public hearing.

Pet. App. 27a.

[5] Madison suggests that the City hurried the renewal proceedings and then delayed final judgment for unstated (but presumably sinister) reasons. Pet. 4. In fact, Madison shaped the procedural schedule throughout. In addition to asking the City to delay adoption of a final order, Madison asked for 30 days to submit additional information after the hearing; both requests were granted. C.A. App. 536-37.

2. *The City's decision.*

Based on a more than 1,200-page record developed through the renewal process, the City Council adopted Ordinance No. 85-58 ("1985 Ordinance") on September 9, 1985.[6] The City Council made three separate decisions (C.A. App. 112):

> "1. TCI's franchise should not be renewed. Within 90 days of this order TCI should submit a plan for orderly removal of its equipment from City poles at the end of the franchise term.
>
> 2. Burke and Catawba will not at this time be granted franchises for the City of Morganton.
>
> 3. The City staff should begin the steps necessary to enable the City to establish a municipal system."

The City did not shut down Madison's system; the Council's Opinion stated that the City would allow the existing franchise to expire. The City did not declare or establish itself as the "exclusive" supplier of cable television service to its citizens. 325 N.C. at 640, 386 S.E.2d at 204. Instead, the City expressly stated that "[s]hould any operator desire to seek a franchise in the future, the Council does not foreclose that possibility." *Id.*

The Opinion states that Morganton decided to allow Madison's franchise to expire for four reasons. First, the City Council found that the system Madison said it would provide for the renewal term was inferior to the systems proposed by all other respondents to the RFI, inferior to the proposed municipal system, and inferior to some systems that had been constructed in communities similar in size to Morganton.[7] Second, the City

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[6] The 1985 Ordinance incorporated a nineteen page "Opinion of the City Council of Morganton Regarding Cable Television" ("Opinion") with an accompanying sixty-six page Appendix. The Opinion provides the detailed bases for each of the conclusions reached in the 1985 Ordinance. C.A. App. 104-93.

[7] The comparative analysis showed, *inter alia*, that some systems in similar-sized communities served by TCI had greater channel

Council concluded that Madison's proposed system would not meet the future cable-related needs and interests of the community as identified in the community ascertainment study. Third, it concluded that Madison had not demonstrated the degree of care or candor that the City had a right to expect from a franchisee.[8] Finally, the City stated that Madison's past service did not warrant renewal.[9] The City made it clear that Madison's request for a renewal franchise would have been denied whether or not the City opted for a municipal system. C.A. App. 106, 112-117.

The Council decided that it could not ignore the deficiencies in Madison's past performance and proposed system and simply authorize construction of additional systems. In addition to the comments made by Madison, all of the cable companies appearing before the Council stated that Morganton's existing utility poles could not support two systems, and that overbuilding was not economically practical and would work to the long-term

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capacity, had two-way activated systems, and provided substantial facilities and equipment which could be used by anyone to produce and cablecast programming on the system ("access" provisions). The City and other applicants for a franchise planned to provide greater channel capacity, two-way activated capability, and more facilities and equipment for access than Madison proposed. Madison has never claimed that the comparative study was inaccurate, or that the City misunderstood the character of the systems proposed by Madison or other franchise applicants.

[8] As the district judge concluded, for example (Pet. App. 17a), "the Council found that Madison had not been candid in its representations to the City . . . . This finding is supported by the fact that Madison denied it had ever had a franchise revoked when in fact its franchise in Richland County, South Carolina had been revoked."

[9] The City was concerned about Madison's admitted failure to wire the entire community during the 20 years it had held the franchise. The City also found that Madison had been unable to respond to some local problems because of the necessity of obtaining approval of local budgets by corporate headquarters. Madison has never denied that these problems existed.

detriment of Morganton's citizens. Pet. App. 19a. Consistent with this undisputed record, the Council found that it had to choose the best proposal before it. It ultimately authorized construction of the proposed City-owned system, because that system, *inter alia*, would provide greater channel capacity and have more advanced capabilities than the alternatives.

The Council's decision did not prevent Madison (or other companies) from communicating via a cable system in Morganton. The proposed municipal system will offer several channels that any member of the public, including Madison, will be able to use to originate and cablecast programming.[10] The Council concluded that ". . . appropriate and adequate provision of access . . . serves the public interest better than grant of multiple franchises where the record indicates there can be no meaningful, long-term competition by overbuilds, and affirmative public harm will result." C.A. App. 123.

3. *The district court decision and the appeal.*

After the City adopted the 1985 Ordinance, Madison filed suit in federal district court. Madison claimed that the Ordinance violated the Cable Communications Policy Act of 1984 ("Cable Act"); the First Amendment; the Fifth Amendment's "takings" clause; the Equal Protection Clause of the Fourteenth Amendment; the Sherman Act and state constitutional and statutory provisions prohibiting monopolies; and 42 U.S.C. § 1983. C.A. App. 12-23. Madison also claimed that the decisions to deny it renewal and to establish a municipal system tortiously interfered with Madison's contracts, breached the franchise between Madison and the City and violated the public purpose clause of the North Carolina Constitution that (Madison claimed) prohibited municipal ownership. *Id.* at 23-27. Madison finally claimed that one provision of the exist-

[10] These channels are referred to as "public access" and "leased access" channels. 47 U.S.C. §§ 531, 532.

ing franchise, a provision that permitted the City to purchase the cable system at the end of the franchise term, was unconstitutional. *Id.* at 27-29. Madison did not claim that the City's decision was in any respect content-based.

The City moved for summary judgment. Madison submitted several affidavits to the district court as part of its opposition to the City's summary judgment motion.[11] While Madison had previously told the City that the rights of way in Morganton could not physically or economically support two systems, these affidavits were introduced for the ostensible purpose of showing that Morganton could support more than one cable system. However, the affidavits in fact did not say that *existing* poles could accommodate two systems or that two cable systems could survive in Morganton.

The district court ruled that the 1984 Cable Act did not apply to this renewal, abstained from deciding other federal issues, and directed Madison to file a complaint on the state monopoly and public purpose arguments in state Superior Court. Madison's state court complaint was dismissed on summary judgment; Madison appealed to the North Carolina Supreme Court. That Court affirmed, ruling that the City could establish a municipal system. It further ruled, as a factual matter, that the City had not established a monopoly, and had not violated North Carolina statutory or constitutional provisions prohibiting monopolies. 325 N.C. at 654, 386 S.E.2d at 211-12.

The case returned to the federal district court, where the City renewed its motion for summary judgment.

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[11] Madison claims it was denied discovery (Pet. 5), but in fact discovery requests it made were correctly quashed, *inter alia*, because Madison's discovery requests were aimed at determining the individual motives of the members of the City Council. Madison has not appealed the discovery orders, although it continues to complain about them.

The district court first reviewed all of Madison's contentions and concluded that there were no material factual issues precluding summary judgment. Pet. App. 13a. The court ruled that the affidavits submitted by Madison were irrelevant. Among other reasons, it stated (*id.* at 15a): "To allow a franchisee to challenge the franchising process in Court on the basis of information which is contrary to information given earlier or which could have been presented but was not, undermines cable regulation." However, the district court also ruled that, even if the affidavits were considered, they would fail to raise a material issue of fact requiring trial. *Id.* at 20a.

The district court then analyzed Madison's First Amendment claims based on the full record of the proceedings before the City Council. The district court concluded that the City's decision was content neutral, a conclusion Madison has never challenged. *Id.* at 16a. The court therefore applied the test set forth in *United States v. O'Brien*, 391 U.S. 367, 377 (1968). The court scrutinized the record at length to determine whether the City's decisions satisfied each part of the *O'Brien* test. Pet. App. 16a-22a. Based on that analysis, the court concluded that the 1985 Ordinance "passes muster under the First Amendment." *Id.* at 22a.

Madison appealed, asking the Fourth Circuit to determine whether the district court had erred in "refusing to consider Madison's evidence in support of its claims" and whether the City's action "prohibiting Madison" from continuing to provide cable service "and establishing a municipal cable system to serve Madison's customers" violated the First Amendment.[12] The Court

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[12] In addition, Madison asked the Court of Appeals to determine "whether there was any genuine issue as to any material fact"; "whether the City's actions in refusing to renew and the procedures used" deprived Madison of due process; whether the City's actions violated 42 U.S.C. § 1983; whether Madison was entitled to renewal under the Cable Act; and whether the City breached its

of Appeals "considered the record" and concluded that "Madison Cable's suit was properly dismissed . . . for the reasons stated by the district court in its careful and thoughtful opinion." *Id.* at 3a.

While the case was pending before the Court of Appeals, Madison decided to take the issues to the voters of Morganton. It mounted a petition drive that placed on the ballot a referendum issue that would have required the City to issue Madison a renewal franchise and to abandon efforts to establish a municipal cable system.[13] On March 10, 1992, voters in Morganton rejected the ballot initiative, 72 percent to 28 percent.

ARGUMENT

Madison asks this Court to grant certiorari to review an unpublished decision of the federal district court for the Western District of North Carolina, and the unpublished, *per curiam* opinion of the United States Court of Appeals for the Fourth Circuit affirming the district court's decision. The Petition should be denied.

Madison's Petition depends on an inaccurate portrayal of the record before the courts below and an inaccurate description of what those courts did. Madison's first question for review is grounded on the assertion that the City "shut down the existing cable system," prohibited "service by other private companies," and granted itself a monopoly." Pet. i, 7. That is not what the City did, as the federal and state courts found. *See infra* at 14-18. Madison bases its second question for review on the assertion that the courts below failed to consider evidence Madison sought to present to them. Pet. i, 5-6, 8. In fact, the courts below reviewed Madison's evidence, assumed it to be true, but concluded the evidence did not raise material

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contractual obligations of good faith and fair dealing. None of these claims is presented in the Petition.

[13] This is the local citizens' initiative referred to at Pet. 4-5, n.3.

issues of fact. Pet. App. 20a. Because the first question is not presented on the record and the resolution of the second question would not affect the outcome, certiorari should be denied.

Even setting aside Madison's factual misstatements, the Petition does not raise issues that warrant this Court's discretionary review. Madison points to two alleged errors which it claims are of important constitutional dimension. It argues that the courts below misapplied the test set forth in *United States v. O'Brien*, 391 U.S. at 377, because those courts improperly deferred to the City's judgments by failing to require the City to show that its actions were the "least restrictive alternative" available to it. Pet. 12-13. However, this Court has made it very clear that under the *O'Brien* test, a governmental action cannot be invalidated simply on the ground that there is a "less restrictive alternative." *Ward v. Rock Against Racism*, 491 U.S. 781, 798-99 (1989). Moreover, the "less restrictive alternative" Madison proposes is authorizing overbuilding, which Madison told the City was not physically or economically feasible. The courts below scrutinized the City's actions precisely as required by this Court's decisions.

Madison also argues that the lower courts erred in ruling (in the alternative) that certain affidavits submitted by Madison need not be considered. Madison fails to mention that the rejected affidavits were presented to contradict evidence Madison itself had presented to the City during the franchising process. Thus, the courts below merely ruled that Madison could not create a First Amendment issue requiring trial by contradicting itself. This conclusion is sound and uncontroversial.

Despite Madison's hyperbole, the decision in this case raises no novel issues. It is entirely consistent with the decisions of other U.S. Courts of Appeals. Madison was at the end of its contract term, had provided poor service,

and would continue to do so in the future. The City simply failed to renew Madison's franchise, allowing it to expire in accordance with its terms; the courts below found that that decision was fully justified. Madison's request for renewal would have been denied whether or not a municipal system was established.

The lower courts found that Morganton could support only one cable system now, and that issuing two franchises would result in affirmative harms of a sort government may prevent. Hence, the decision to issue one franchise was justified. Based on the record before it, the City had to choose among competing applicants to build a cable system on public property. Because it is undisputed that the proposed municipal system offered greater channel capacity, more advanced technological capabilities and greater access than other proposed systems, the City's decision to put its own property to optimal use by establishing a municipal cable system raises no serious constitutional questions. Indeed, Madison is complaining because the City did just what Madison said the City should do during renewal proceedings: authorize construction of a system by the applicant that offered to build the best system.

I. THIS CASE DOES NOT GENUINELY RAISE THE QUESTIONS PRESENTED IN THE PETITION.

A. Madison Mistakenly Claims That the City Took Actions It Did Not Take.

Madison claims that certiorari should be granted because the City "shut down" the existing system owned by Madison, prohibited "service by other private companies" and "granted itself a monopoly over the medium of cable television." Pet. 7. The City, however, did not take any of these actions.

The City did not "shut down" Madison's system. As shown above, Madison had a 20-year franchise that

expired in 1986. The City now has a right either to buy the system or to require Madison to remove it, in accordance with the terms of the franchise contract between the City and Madison. Absent an absolute right to a franchise (a right Madison does not claim before this Court), the City had every reason to deny renewal and allow the contract to expire. As the courts below found, Madison had provided bad service in the past and would provide an inadequate system for the future.[14] This alone is fatal to Madison's Petition. If the decision to deny was proper, Madison has no standing to challenge any other aspect of the City ordinance because such challenges could not afford Madison relief for its claimed injury.[15]

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[14] Madison does not challenge the courts' conclusion that denial of renewal was justified, other than to make the conclusory charge that the lower courts ignored its "franchise proposal, its explanations, its customer surveys and opposing arguments." Pet. 18. The district court's decision shows that the court reviewed and based its decision upon statements and explanations made by Madison in its renewal proposal and during the renewal hearings. *See* Pet. App. 18a-19a (quoting statements from Madison's renewal proposal). Madison never submitted "customer surveys" to the City or to the court. There is thus no reason for this Court to suppose the lower courts' conclusion involved any error, much less error of constitutional dimension.

[15] As the holder of a franchise that had not been renewed for cause, Madison's alleged injury would not flow directly, *cf. S. v. D.*, 410 U.S. 614, 616-617 (1973), from the City's separate decision in favor of municipal ownership and hence Madison has no standing to challenge this action. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 485 (1982). *See also Gladstone v. Village of Bellwood*, 441 U.S. 91, 100 (1979) (quoting *Warth v. Seldin*, 422 U.S. 490, 505 (1975)). Madison's present interest in the question of municipal ownership is even less than the interest of the general public. *Cf. Warth v. Seldin*, 422 U.S. at 499-502. The City Council has already concluded that Madison has demonstrated neither the sort of care or candor that the City had a right to expect from a franchisee nor the ability to respond to local problems because of absentee control (*see supra* at 8 n.8). Any decision by this Court on the municipal ownership issue would not change Madi-

The City has not granted itself a monopoly over the cable medium or prohibited speech by others, as the North Carolina Supreme Court found, 325 N.C. at 654, 386 S.E.2d at 211-12:

> Morganton has not declared or established itself as the "exclusive" supplier of cable television service to its citizens. It has simply failed to renew Madison Cable's expired franchise or to grant a franchise to two other applicants for failure of their proposals to meet community needs. Specifically, it has not foreclosed for any period the possibility that franchises might be granted to other applicants.

Moreover, the City cannot monopolize or control speech on the municipal cable system. Congress specifically contemplated and authorized establishment of municipal cable systems. 47 U.S.C. § 531(e)(1). Congress, however, prohibited municipalities that establish such systems from controlling the content of cable services carried over the cable system, "unless such control is exercised through an entity separate from the franchising authority." 47 U.S.C. § 531(e)(2). Consequently, the City will not be picking and choosing the programming services carried on the system, and it will not be permitted to control the content of the programming services provided.[16] Indeed, Madison and others will be able to speak via cable in Morganton even after a municipal system is established. The City will set aside channels and provide facilities and equipment which any person, including Madison, can use at no charge to create and cablecast programming.

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son's position of having lawfully been denied renewal and accordingly any decision by this Court would be merely advisory.

[16] It would be hard to imagine how a city-owned cable system could control the content of cable programming services in any event. As Madison suggests, the primary speech activity in which cable operators engage is the packaging of programming actually produced by others. Pet. 9 and n.5. Once the programming services are selected, the content of the services do not vary depending on who owns the cable facility.

The City cannot control the content of programming carried on these "access" channels. 47 U.S.C. § 531. Additionally, given the capacity of the system it proposes to build, the City will be required by federal law to set aside certain channels for "leased" use by others, including Madison. 47 U.S.C. § 532.

Thus, the first question that Madison asks this Court to review is not presented on this record. The issues in this case have nothing to do with control of speech, as Madison's Petition presumes, but instead concern the management of public property and public facilities. Madison is claiming that, if particular public property can accommodate only one facility that can be used for speech, the City forfeits its right to build a publicly-owned facility and is instead constitutionally required to turn over control of public property to a private person, even if the result is fewer public benefits and affirmative public harm (and even if there are no qualified private applicants). *See* C.A. App. 112-23.

This proposition is fundamentally at odds with the decisions of this Court, including *Ward v. Rock Against Racism*, which holds that a city may own and control the sound system at a municipal bandshell, and may require all who use the bandshell to use the municipal sound system. Governments own dozens of facilities that are used for communication by government and others—libraries, theatres, auditoriums, public television stations, parks, museums and the like. This Court has never held that government must turn control of even unique public facilities over to private parties; it has instead allowed government to maintain control of those facilities, and to control access to them. *See Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) (mailboxes used to communicate with teachers); *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788 (1985) (medium for charitable solicitation in government buildings); *Lehman v. City of Shaker Heights*,

418 U.S. 298 (1974) (advertising space on buses). That there is one Lafayette Park does not mean that the Park Service must relinquish control of the facility to protestors, to use as they wish, even on a temporary basis. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (government may regulate uses which make property inaccessible to others, even though that regulation directly affects speech). *A fortiori*, there is no constitutional requirement that government grant, in the name of the First Amendment, a permanent interest in scarce rights of way to a cable company.[17] The wisdom of this approach is particularly obvious on the facts here. Madison offered to build a relatively low-capacity system, with limited technical capabilities, generally not available for use by others. The City proposed to build a significantly higher-capacity, more technically advanced system, open to every member of the public (including Madison). Adopting Madison's view of the law simply does not advance the First Amendment. Accordingly, the courts below correctly rejected the claims presented on this record.[18]

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[17] Madison claims *Legi-Tech, Inc. v. Keiper*, 766 F.2d 728 (2d Cir. 1985), compels the opposite result, but the case is inapposite. Legi-Tech sought access to a state data base which was open to other members of the public. It did not claim that the state was prohibited from owning the data base or that the state was required to sell the data base to a private party merely because the data base was the sole source of the information Legi-Tech required for its business. The Second Circuit thus did not address the point pressed by Madison, namely, that where there can be only a single facility on public property, control of the facility must be turned over to a private party. Indeed, to the extent the case is relevant at all, it undercuts Madison's claim. The Second Circuit emphasized that Legi-Tech was seeking only the same rights of access afforded the general public. 766 F.2d at 735-36. Here, Madison claims that, where only one franchise can be issued, a special right of access must be granted to a single private party.

[18] Madison's position is akin to that of a lessor who bargains for the right to operate a public auditorium on city property in return

B. Madison's Second Question Incorrectly Assumes That the Courts Below Ignored Evidence It Sought To Present.

Madison claims that certiorari must be granted because the courts below ignored affidavits that precluded summary judgment. As noted above at 11-13, while the district court ruled that the affidavits should not be considered, it also reviewed the affidavits and concluded that, even if the affidavits were considered, summary judgment must be granted to the City. Pet. App. 20a. Thus, the second question Madison asks this Court to review is premised on a mischaracterization of the decisions of the courts below; given the alternative resolution by the lower courts of the evidentiary issues, there is no need for this Court to reach the issue posed by Madison.

II. MADISON FAILS TO IDENTIFY ANY ERRORS MADE BY THE LOWER COURTS THAT WARRANT REVIEW.

A. The Lower Courts Correctly Applied the *O'Brien* Test In Reviewing the City's Action.

Madison contends that certiorari is warranted because the lower courts "made no effort whatsoever" to determine whether the ordinance adopted by the City was necessary to advance substantial governmental interests, and instead merely "deferred" to the City's judgments. Pet. 14. Much of Madison's attack is based on a criticism of conclusions the courts never drew (*id.* at 13), and a pointed refusal to address the analyses performed by the

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for the promise to sell the auditorium to the city after 20 years or remove it to make space for a better facility. At the end of the 20-year term, the lessor can hardly claim a right to maintain its position permanently on the ground that it is a speaker. Nor can it demand (as Madison does here, *see infra* at 21-22) that the city must turn over the facility to it or to another private speaker and then buy additional land if the city wishes to establish its own theater or provide for a better auditorium.

courts, which show that the courts closely scrutinized the City's actions. *See* Pet. App. 18a-20a, discussing the City's decision to license only one system in light of the evidence before it.[19] But, the central point of Madison's claim is that, under *O'Brien*, a court must strike down a regulation if there is any "less drastic measure" which would advance the substantial interests the government seeks to protect. Pet. 12.

In *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984), and *Rock Against Racism*, 491 U.S. at 798-99, this Court "squarely rejected" the approach urged by Madison. While restrictions on speech must be "narrowly tailored" to serve a substantial governmental interest, a restriction "need not be the least-restrictive or least-intrusive means" of advancing that interest. 491 U.S. at 798-99. The *O'Brien* test is satisfied if government shows that the regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation. *Community for Creative Non-Violence*, 468 U.S. at 297. The district court applied precisely this test in reviewing the City's actions. Pet. App. 18a. There is no legal error warranting review.

Moreover, while Madison contends that the courts below ignored "obvious" and less restrictive alternatives open to the City (Pet. 13), it fails to cite a single example of a practical alternative that would have advanced the City's substantial interests, and hence fails to suggest a reason why the decisions below should be reviewed, even were Madison's theory of the law correct.

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[19] At note 7, for example, Madison contends that the lower courts eschewed *de novo* review of the City Council's decision, citing Pet. App. 13a as proof of the point. All the district court states there, however, is that it will not decide as a policy matter whether the City's choices are good or bad—an unobjectionable position. Nothing in the decision suggests the district court avoided its obligations to consider whether the City's actions comported with the First Amendment.

Madison claims, for example, that if the City were concerned about Madison's performance, it could have simply allowed "additional competition" or imposed "reasonable minimum service requirements" on Madison. Pet. 13. But this "alternative" ignores the obvious fact that everyone, including Madison, told the City that it would not be feasible to add an additional system; authorizing "additional competition" would have been a fruitless act. It also ignores the fact that the City had good reason to believe Madison would not meet the needs of the community, even if its obligations were spelled out in a franchise contract. A central claim below, after all, was Madison's contention that it did not have to abide by its contractual obligation to remove wires from poles or sell its system to the City. C.A. App. 27-31.

Madison contends that the least disruption to rights of way would occur if Madison were allowed to remain where it is. Pet. 13. This may be so, but as the courts below concluded, leaving Madison the entrenched monopolist prevents optimal use of public property and harms other substantial government interests. Pet. App. 17a-18a. Madison makes the related claim that, allowing it to remain on the poles while changes are made to accommodate a second system would involve "only slightly more disruption, if any" than leaving Madison alone on the poles. Pet. 14. This unsupported claim is disingenuous in light of Madison's statement to the City that half the poles in the City would have to be replaced, 90% would require substantial work, and service interruptions could occur. Pet. App. 18a-19a.

The essence of Madison's claim is set forth at Pet. 14 n.8, where it suggests, almost offhandedly, that the "less drastic measures" test requires the City to build new facilities to accommodate Madison's system. That claim is wrong. The First Amendment does not require government to subsidize the speech of any speaker. *Regan v. Taxation With Representation of Washington*, 461 U.S.

540 (1983). Forcing government to install the poles and facilities necessary to accommodate Madison's cable system would require a subsidy of the most egregious sort. On this record, the lower courts' decisions were correct, no matter what standard of review is used.

B. The Courts Did Not Err In Ruling In the Alternative That Certain Affidavits Submitted By Madison Should Be Ignored.

Madison contends (Pet. 15-17) that certiorari is warranted because the lower courts ignored facts that precluded summary judgment and instead confined their review to the record before the City Council at the time it made its decision regarding Madison's request for renewal. Setting aside other problems with this claim (*see supra* at 11, 13, 19), the only evidence Madison sought to introduce was evidence that was intended to contradict its own statements made in the franchise hearings before the City Council.

The lower courts' refusal to consider this information is consistent with general principles of law. A party cannot avoid summary judgment by submitting affidavits to contradict itself. *Foster v. Arcata Assoc. Inc.*, 772 F.2d 1453, 1462 (9th Cir. 1985), *cert. denied*, 475 U.S. 1048 (1986). It cannot "invite error" and then claim the resulting decision should be reversed. *Harvis v. Roadway Express*, 923 F.2d 59 (6th Cir. 1991). It follows that First Amendment claims cannot be created by saying one thing to a city to induce an action, and then later revising the facts if the result is unsatisfactory. If an applicant for a parade permit told a city it wished to close 40 city blocks during rush hour, and was denied a permit because of the effect on competing uses, the applicant could hardly argue that its First Amendment rights were violated because, in fact, it had meant to parade only on one block at midnight. A city can be expected or required to respond only to the information

before it, and the courts below were entitled to decide this case on that basis.

Landmark Communications, Inc. v. Commonwealth of Virginia, 435 U.S. 829 (1978), the case on which Madison most heavily relies for the proposition that it is entitled to adduce evidence beyond the record, does not compel a different conclusion.[20] *Landmark* involved review of a viewpoint-based restriction on speech, and hence required the strictest scrutiny of the government action. This is not such a case, as Madison's Petition reveals. Where *O'Brien* is applied, the Court uses a different and less stringent standard of review that focuses on the reasonableness of the legislature's decision. *Rock Against Racism*, 491 U.S. at 798-800 and n.6; *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52 (1986). Moreover, *Landmark* involved review of a legislature's conclusory determination, without supporting facts in the record, that a certain type of speech constituted a clear and present danger. 435 U.S. at 843. The Court was concerned that the affected speaker have the opportunity to show that this bare legal conclusion was

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[20] Other cases relied on by Madison also tend to support the City's arguments. Madison's use of *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464 (1981), depends on creative editing. The quote, truncated in Pet. 16 n.9, goes on to emphasize that "[w]here there was evidence before the legislature reasonably supporting the [action], litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken." *Id.* Madison also cites *Chastleton Corp. v. Sinclair*, 264 U.S. 543 (1924), *Kress, Dunlap & Lane, Ltd. v. Downing*, 286 F.2d 212 (3d Cir. 1960), and *Milnot Co. v. Richardson*, 350 F. Supp. 221 (S.D. Ill. 1972), but these cases merely stand for the proposition that, where the parties allege that changed circumstances have altered the validity of the record, the Court can look beyond the record. Madison, of course, has not urged "changed circumstances." *Weaver v. Palmer Bros. Co.*, 270 U.S. 402 (1926), stands for the proposition that where no one objects to introduction of extra-record evidence, a Court of Appeals will not on its own motion find admission of that evidence to be reversible error.

not justified. 435 U.S. at 844. The opposite case is presented here. Madison *did* have the opportunity to challenge all relevant facts and to present issues. In fact, Madison's main problem is that the City took Madison at its word: that to avoid harm to the City and to the public, it should select the best qualified operator. Because there is plenary factual support for the City's decision, *Landmark* does not require looking beyond the record which was before the City.

Strong public policy reasons justify restricting review to the record here. The authority and ability of a city to conduct a rational cable franchising process depends on its ability to develop and rely on a record.[21] To allow a franchisee to challenge the franchising process on the basis of information that is contrary to information it presented earlier or that could have been presented, but was not, undermines legislative decisionmaking. Legislatures, like courts, have a compelling interest in protecting the integrity of their processes. Madison cannot now be heard to complain that the City's decision to limit cable franchising to one operator is factually without support when the Council's decision is fully supported by Madison's own representations to the City.

C. The Lower Court Decisions Are Consistent With Decisions of Other Circuit Courts.

Madison erroneously claims that the approach taken by the lower courts here is in "marked contrast" to the approach taken by other courts. Pet. 14. In fact, the decisions below are consistent with the relevant decisions of the Courts of Appeals which have reviewed the constitutionality of franchising. In *Central Telecommunications, Inc. v. TCI Cablevision*, 610 F. Supp. 891 (W.D. Mo. 1985), *aff'd*, 800 F.2d 711 (8th Cir. 1986), *cert.*

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[21] Under the Cable Act, the City has express responsibility for making franchising decisions. 47 U.S.C. § 541(a)-(b).

denied, 480 U.S. 910 (1987), the Eighth Circuit ruled that a City could deny renewal to TCI based on the physical and economic characteristics of cable, emphasizing:

> TCI gained its monopoly through an earlier grant of a de facto exclusive franchise. Unless the City opened up competition *for* the market [through a competitive franchising process], TCI would have remained entrenched in its monopoly position. TCI refused to provide other than an outmoded limited channel system whereas Central proposed a state-of-the art system . . . . It is difficult for us to see how, on this record, TCI's position enhances First Amendment values.

800 F.2d at 717 (emphasis in original). To the same effect are *Omega Satellite Products Co. v. City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982); *Community Communications Co. v. City of Boulder*, 660 F.2d 1370 (10th Cir. 1981), *cert. dismissed*, 456 U.S. 1001 (1982). *See also Erie Telecommunications, Inc. v. City of Erie*, 659 F. Supp. 580 (W.D. Pa. 1987), *aff'd on other grounds*, 853 F.2d 1084 (3d Cir. 1988). The Ninth Circuit decision in *Preferred Communications v. City of Los Angeles*, 754 F.2d 1396 (9th Cir. 1985), *aff'd on narrower grounds*, 476 U.S. 488 (1986), is not inconsistent with the Fourth Circuit decision, because it does not address the application of the First Amendment to situations where only one system can be accommodated. This Court has, in any event, refused to adopt the reasoning of the Ninth Circuit. *City of Los Angeles v. Preferred Communications*, 476 U.S. 488, 493 (1986).

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 91-1348

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

MADISON CABLEVISION, INC.,
Petitioner,
v.
THE CITY OF MORGANTON, NORTH CAROLINA, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

ARGUMENT

I. THE FIRST AMENDMENT ISSUES ARE PLAINLY EVIDENT IN THE CITY'S ARGUMENT THAT ITS ACTIONS ELIMINATING PRIVATE CABLE TELEVISION SERVICE AND ESTABLISHING A GOVERNMENT CABLE SYSTEM ARE JUSTIFIED

The City suggests the Court need not consider the First Amendment issues raised by its establishment of a municipal cable television system and its prohibition of private cable service, characterizing its appropriation of a medium of expression exclusively for government use as simply "a decision [by the City] to put its own property to optimal use" (Opp. Br. 14), and equating its actions with routine municipal decisions like choosing a parade route or issuing rules for the use of city parks. Accord-

ing to the City, it "had to choose among competing applicants to build a cable system on public property." (Opp. Br. 14) That formulation of the issues, of course, begs the constitutional question by assuming that the First Amendment indeed allows cities to restrict the use of the medium of cable television to a single provider selected by the City or allows cities to decide that private cable service can be prohibited altogether in order to ensure the success of a municipal system.[1]

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . .

Buckley v. Valeo, 424 U.S. 1, 48-49 (1976). The idea that government may restrict private speech through a particular medium in order to foster speech by the government is even more foreign to the First Amendment.

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[1] The City questions Madison's "standing" to pursue its challenge to the City's franchising process on the theory that Madison has not demonstrated that it would prevail if the franchising process were repeated. (Opp. Br. 15) That reasoning, once again, assumes that the City's auction process is constitutionally permissible—the very issue to be decided. Equally important, there is no requirement that a party demonstrate that the responsible government agency would change its decision in order to seek judicial review of unconstitutional action. The cable company in the case of *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986), refused to participate at all in the Los Angeles bidding process and clearly would not have been granted a franchise by the City under any circumstances. The City of Los Angeles pressed the standing argument in that case. (Petitioner's Br. 40-41) This Court nevertheless reviewed the City's actions and remanded the case for full adjudication of the disputed factual issues and evaluation of the First Amendment issues under the test established in *United States v. O'Brien*, 391 U.S. 367 (1968). In this case, the lower courts did not deny relief on the basis of standing and there is no merit to the suggestion that petitioner lacks standing to maintain this action. *See Valley Forge Christian College v. Americans For Separation of Church & State*, 454 U.S. 464 (1982).

Yet that is precisely the result in this case and is why the lower courts' decision merits review by this Court.

The only decision by this Court on the question of city authority to control cable television, *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986), refused to give blanket approval for the use of an "auction" franchising process and required the federal courts to examine the underlying assumption that only one cable television operator should be allowed to provide service. In *Preferred*, this Court determined that the federal courts were required to weigh the First Amendment values of freedom of speech and press against the interest of protection of the public rights-of-way and other competing "societal interests." 476 U.S. at 495-96. Using the analysis articulated in *United States v. O'Brien*, 391 U.S. 367 (1968), the Court reiterated in *Preferred* that the federal courts were required to use heightened scrutiny to judge municipal actions that have the effect of restricting speech through the medium of cable television. The decision of the lower court was remanded for a factual determination of whether the public rights-of-way could accommodate the facilities of more than one cable television system.

Here, the lower courts effectively abandoned the constitutional requirement for factual development and critical analysis of the governmental interests advanced to justify a restriction on the media. Instead, the trial court concluded as a matter of law "that the case should be decided on the basis of the record before the [City] Council" (Pet. App. 19a-20a), prohibited all discovery and resolved the key factual issues against Madison despite its evidence controverting the City's claims.[2] The court of ap-

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[2] Madison did present competent evidence to establish that the utility poles and rights-of-way in Morganton could accommodate a second cable system. Madison also sought discovery from the City, which owned the utility poles in question, on this issue, but the district court prohibited all discovery by Madison, accepting the

peals adopted the reasoning of the district court. In approving the City's actions without the benefit of discovery and meaningful adjudication of the disputed facts, the lower courts failed to fulfill their constitutional obligation of independent judicial review, deferring instead to the judgment of the City Council as a "legislative body" on every issue of fact.

In addition to assuming the factual validity of each rationalization put forward by the City, the lower courts also failed to scrutinize the asserted governmental interests to ensure, as required by *O'Brien* and *Preferred*, that the restriction on expressive activity was no greater than necessary to serve those interests.[3] The district court

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City's contention from the outset that discovery of any kind, including the facts concerning the physical capacity and status of the rights-of-way, would represent an impermissible intrusion into the decision-making processes of the City and its officials. Madison expressly opposed the City's premature motion for summary judgment, filed simultaneously with the Answer, on the grounds that Madison had been denied an opportunity for discovery. The district court ignored the procedural irregularities and granted summary judgment without comment on Madison's arguments. Madison renewed its procedural objections on appeal, but the court of appeals adopted the district court opinion as its own without elaboration.

[3] In its brief, the City attributes to Madison, in the form of a purported quotation from Madison's petition to this Court, a statement that was never made. On page 13 of its brief, the City chides Madison for asserting that the City was required to demonstrate that its actions constituted the "least restrictive alternative." A review of the cited pages of the petition (Pet. at 12-13) will reveal that Madison stated the constitutional requirement correctly, i.e., that the government must demonstrate that its actions were no more restrictive of First Amendment rights than necessary, not that it was required to demonstrate that it had chosen the least restrictive alternative. The error in the courts below was that they failed to consider alternatives at all. The City argued below, as it does now, that it was not required to consider less restrictive measures because its "ownership" of the public rights-of-way gives it absolute power to control their use, even for expressive activity protected by the First Amendment. The lower courts accepted this reasoning and erred in not evaluating whether the City's interests in limiting use

found that granting "a single franchise furthers the following substantial government interests: prevention of disruption in city streets and rights of way; conservation of the space on city utility poles; and ensuring that public rights of way are optimally used, in a manner that serves the public interest." (Pet. App. 17a-18a) (Citations omitted.) In approving the City's justifications for regulation, the district court did not weigh the asserted governmental interests against the countervailing values of protection of freedom of speech and the press. The court assumed that the disruption caused by a second cable system would be intolerable, and entered summary judgment accordingly, despite Madison's evidence that a second system could be accommodated through routine pole modifications and other common measures used every day in communities throughout the United States.

The district court overlooked its constitutional obligation to assess the City's disruption claims with a critical eye because it accepted the City's argument that as owner of the rights-of-way it could not be required to make any accommodation for the communication facilities of a private company. The City has repeated that argument in its brief to this Court. (Opp. Br. 21-22) In the *Preferred* case, the City of Los Angeles argued to this Court, just as Morganton does now, that it should not be required to allow any increased use of the rights-of-way in order to accommodate a second cable system. The Court rejected that argument and remanded the case for a thorough consideration by the trial court of the capacity of the rights-of-way and the extent of disruption that might be entailed. In this case, the district court refused to make such a determination because it apparently believed, wrongly and without any evidence on the question, that

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of the rights-of-way justified a complete ban on private cable service. Having accepted the City's argument that a prohibition of private cable service was inherently within the City's property rights, it is hardly surprising that the lower courts saw no need for analysis of other alternatives.

the City would have to pay for, or incur the expense of, any modification of utility poles or other facilities that would be required to install a second cable system.

The City makes this expense argument again in its brief to this Court (Opp. Br. 21-22), now claiming that Madison seeks an improper government subsidy for its speech. However, this contention is entirely unjustified. Madison has always accepted its obligation to pay for any changes in the configuration of utility lines and poles, or for other changes made necessary for installation of its facilities. Madison has borne all such expenses during the entire period of the operation of its system. It is an established custom and practice in the utility industry to allocate costs and expenses for construction or improvement of shared facilities to the party requesting expansion. In every instance, whether the utility poles are owned by a city or a private utility, the cable operator is required to pay the cost of any changes in the utility facilities that are required in order to accommodate a cable system. The district court erred when it determined, as a matter of law, that Morganton would be required to bear such expense, and understandably, having been lead erroneously to focus on that question, failed to consider the extent of any disruption that might be involved or to consider ways in which such disruption could be minimized short of prohibiting private cable television service.

The City's argument that this case involves only the "management of public property and public facilities" evidences a troubling disregard for the public benefit of free speech and freedom of the press. The scope of the City's power to limit those protected freedoms in the exercise of its responsibility to manage public property is the issue that warrants attention by this Court.

II. THE PETITION ACCURATELY DESCRIBES THE ACTIONS TAKEN BY THE CITY

In its effort to obscure the obvious First Amendment impact of its decision to usurp control over the medium of cable television, the City seeks to characterize its actions as natural and unavoidable, as though the elimination of Madison's rights and its business was an unintended side effect of some unrelated decision. In truth, it was the City that chose to combine consideration of Madison's right to renewal of its franchise, and the franchise applications of two other private companies, as part of its determination of whether the City should go into the cable business. The City conducted one proceeding, with a single public hearing, and issued one decision dealing with all three private requests simultaneously. The City not only concluded that it would deny the franchise requests of all three private companies and establish a municipal system, it also declared that it would not review the "overbuild situation", i.e., would not consider authorizing a second system, for a period of five years. The City's brief fails to acknowledge this critical fact in its effort to disguise the degree of self-interest in the City's decisions. The statement quoted by the City (Opp. Br. 7) that it would "not foreclose" consideration of future franchise applications was no more than a cosmetic afterthought intended to minimize the harsh reality of the actions taken by the City.

The outcome of the City's deliberations was never in doubt—if the City decided to go into the cable business, it was clear from the beginning, it would not allow any private competition. The economic projections of feasibility for the municipal system were based on the assumption that there would be no competition. The City claims that it did not shut down Madison's private cable system. However, it plainly did so when it refused to authorize continued service by Madison as part of its decision to establish a municipal cable system. Whatever

justifications the City now offers for its actions, it is too late for it to argue that it did not deliberately use its power as the franchising authority to preclude continued service by Madison. The City vigorously defends its right to allow only one cable system on the grounds that cable television is a "natural monopoly." The City glosses over the lack of evidence on this complex issue and the fact that whatever monopoly may have existed was dictated by the City's policy of allowing only a single operator. The result of the City's combined actions is indisputably a government monopoly in Morganton over the medium of cable television. This unprecedented action required a thorough and searching First Amendment examination by the federal courts; instead it was given peremptory treatment and improperly disposed of through summary judgment based on deference to the City's determination of the disputed facts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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